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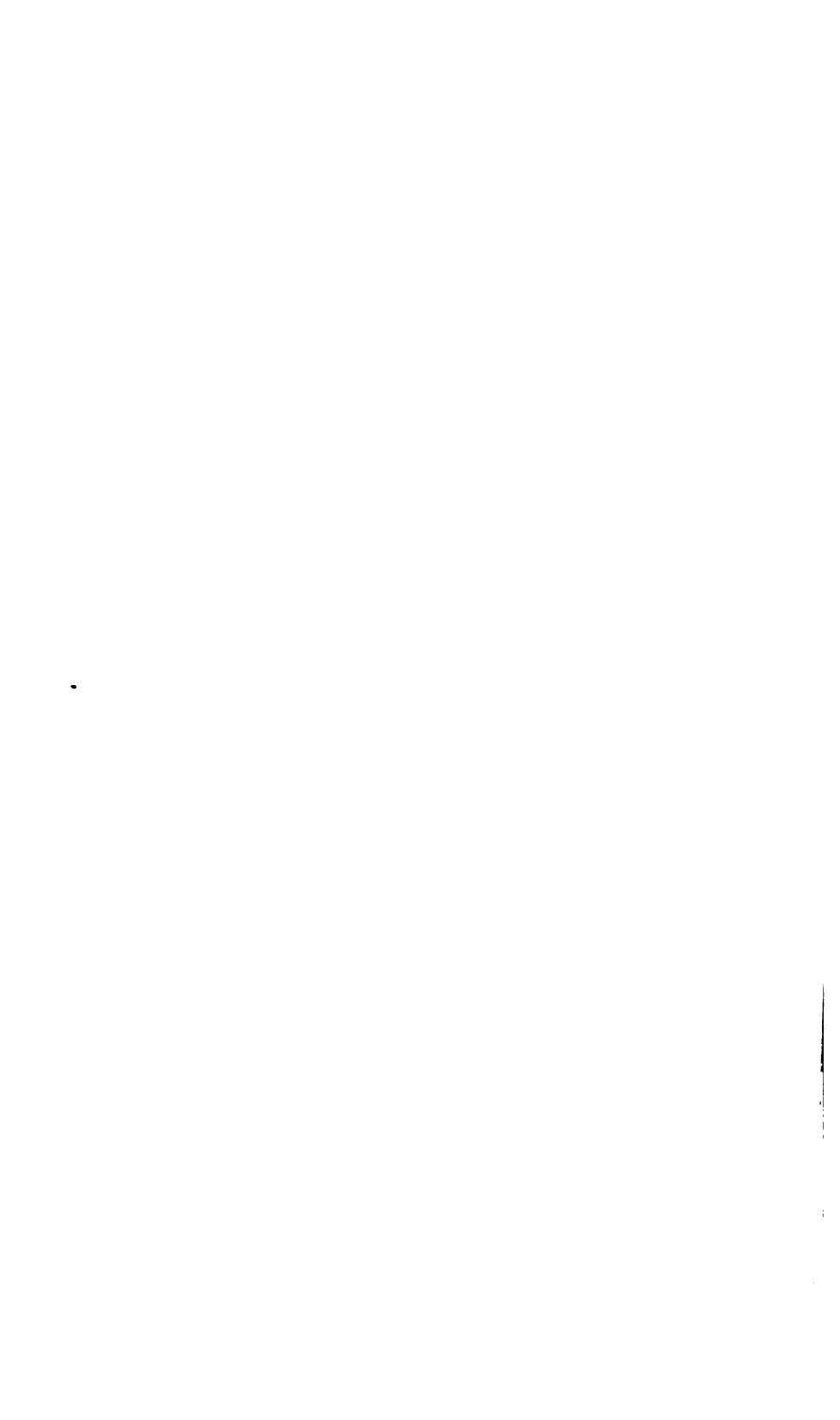
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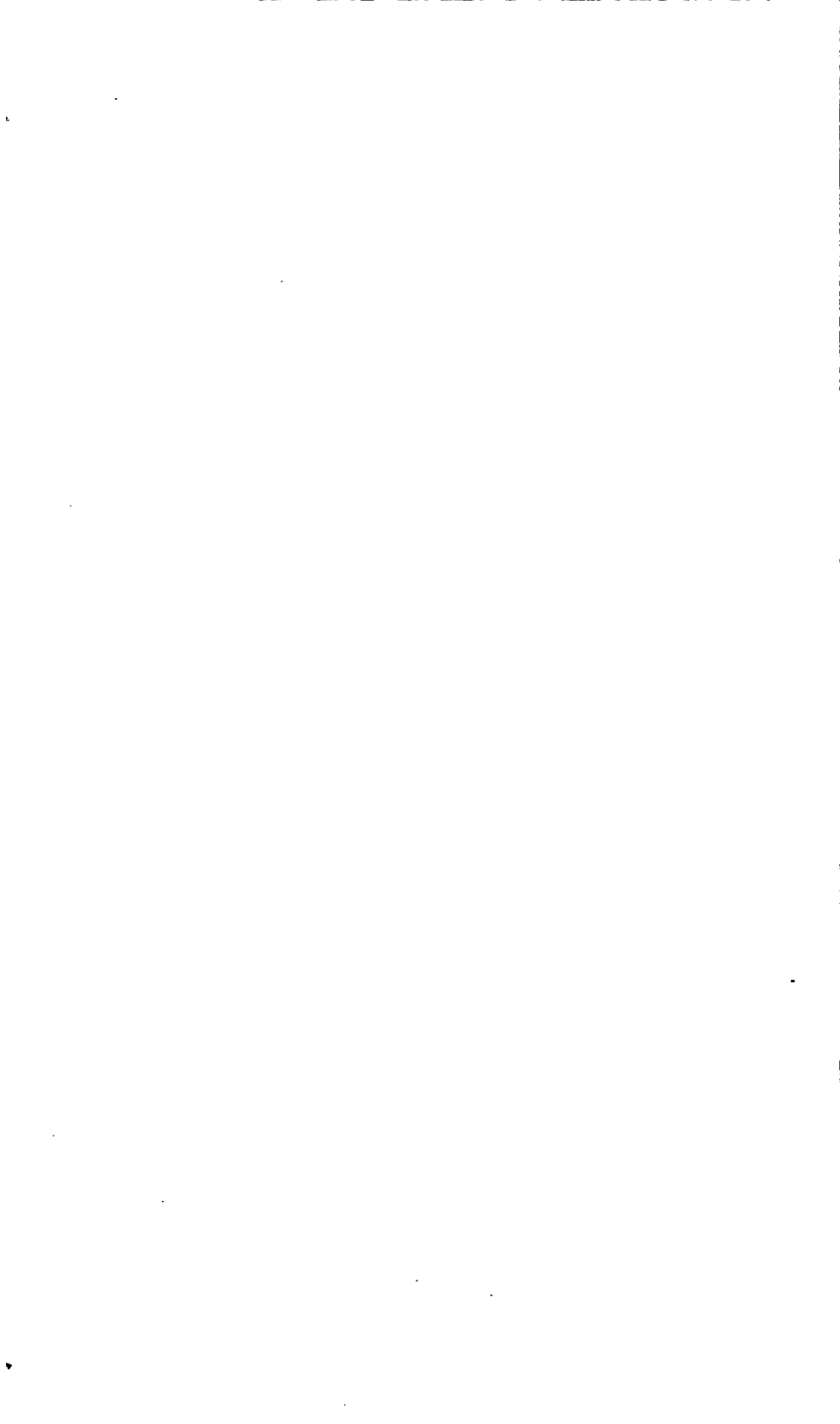














THE
AMERICAN DECISIONS

CONTAINING THE

CASES OF GENERAL VALUE AND AUTHORITY

DECIDED IN

THE COURTS OF THE SEVERAL STATES

**FROM THE EARLIEST ISSUE OF THE STATE REPORTS TO
THE YEAR 1899.**

COMPILED AND ANNOTATED

By A. C. FREEMAN,

**COUNSELLOR AT LAW, AND AUTHOR OF "TREATISES ON THE LAW OF JUDGMENTS,"
"COVENANCY AND PARTITION," "EXECUTIONS IN CIVIL CASES," ETC.**

VOL. XCII.

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VOL. XCII.

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AMERICAN DECISIONS.
VOL. XCII.



CASES
IN THE
SUPREME COURT
OF
GEORGIA.

HORNE v. STATE.

[57 GEORGIA, 80.]

IN GEORGIA, INDICTMENT SHOULD CHARGE DEFENDANT "IN THE NAME AND BEHALF OF THE CITIZENS OF GEORGIA"; but an exception on the ground of failure to so charge must be taken before trial, and if not so taken, will not be good in arrest of judgment.

DEFENDANTS, UPON APPLICATION, HAVE RIGHT TO BE TRIED SEPARATELY in all cases where they are indicted for an offense which does not require the joint act of two or more to constitute the offense; the rule is otherwise in those cases which require the concurrence of two or more in the commission of the offense. In cases of the latter class, the matter rests in the legal discretion of the court before whom the trial takes place.

JUDGE SHOULD DISCHARGE HIS DUTY WITH IMPARTIALITY, and it is error for him to remark, on a trial for murder, in ruling upon a question, that the deceased "had a right to be mad; he thought anybody shot had a right to be mad." The deceased had no right to be mad unless he had been wronged, and whether or not the defendants had wronged him, and if they had done so, to what extent, was the issue on trial by the jury, as to which they should receive no intimation from the judge of what he thought the verdict should be.

INDICTMENT for murder. The indictment charged Ben Horne, Scott Horne, Edmund Horne, Richard Horne, and George Jackson, Jr., with the murder of Joab W. C. Horne. After the first juror had been sworn, the defendants moved to sever on the trial. The state objected on the ground that the motion came too late. The court overruled this objection, and required the defendants to assign special reasons for severing; whereupon they assigned specifically that they wished to use each other as witnesses. Counsel for the state consented that the defendants should testify as if severed, and thereupon the

court refused the motion to sever. In the progress of the case the solicitor-general asked a witness the condition of the deceased's mind towards the prisoners after the mortal wound had been given,—whether kind or malevolent. The court refused to allow the witness to answer the question, remarking, "Horne had a right to be mad; he thought anybody shot had a right to be mad." The jury found the defendants guilty, who thereupon moved to arrest the judgment. Other facts appear from the opinion.

C. T. Goode and Samuel Elam, for the plaintiffs in error.

N. A. Smith, solicitor-general, and W. A. Hawkins, for the state.

By Court, WALKER, J. 1. By the revised code, section 4535, the form of an indictment should be: "The grand jurors selected, chosen, and sworn for the county of —, to wit: in the name and behalf of the citizens of Georgia, charge and accuse," etc. By section 4536, all exceptions which go merely to the form of an indictment shall be made before trial, and no motion in arrest of judgment shall be sustained for any matter not affecting the real merits of the offense charged in the indictment. After the rendition of the verdict, the defendants moved to arrest the judgment because the bill of indictment fails to charge defendants "in the name and behalf of the citizens of Georgia." Did this omission affect the real merits of the offense charged in the indictment? Was it not an exception which went merely to the form of the indictment? The exception, being merely to the form of the indictment, should have been taken before trial.

2. Ought the court to have permitted the defendants to sever on their trial? This is an important question, and has received our careful consideration. By the old law, when two or more defendants were jointly indicted, any one might be tried separately, except such offenses as required the concurrence of two or more to constitute the crime; in such cases, the defendants should be tried jointly: Cobb's Dig. 841. The act of 1856 (Pamp. Acts, p. 266) amended this, and authorized the trial of one or more in those cases which require the joint act of two or more to constitute the crime. The history of this act, as we understand it, and the reason for its passage, was, that in many cases of riots, etc., some of the parties would avoid arrest, and one party might be held for years without being tried, because the other party charged in the

indictment could not be brought to trial. This was especially so in the counties bordering on the state line, and proved to be in many cases a great hardship to those parties who were indicted for such offenses and remained within the jurisdiction of the court. They could not be tried separately, and they could not demand a trial (*McAllister v. State*, 17 Ga. 618), and were liable to be bound indefinitely to attend upon an indictment for an offense for which they could not be tried. The act of 1856 intended to remedy this evil, and allow any one of such defendants to be tried separately, without waiting for the arrest of others charged in the same indictment. The effect of this amendment was to advance the ends of justice and secure to the citizen his right to a speedy and public trial. Section 4595 of the revised code intended to embrace the provisions of the code of 1833 as amended by the act of 1856, and authorized the separate trial of defendants for all offenses. In *Caldwell v. State*, 34 Ga. 10, this section was before the court for construction, and the court seemed to hold that the court is the repository of the discretion given by the statute to say in what cases a defendant may be tried separately, though jointly indicted. The court, however, there say (page 20), "We do not say it is an unbridled, uncontrollable discretion; but where severance is demanded as a right, unsupported by cause shown, and refused, we are wholly indisposed to interfere with the exercise of the discretion." That was an indictment for riot,—a crime which required the joint act of two or more to constitute it,—and the defendants demanded a separate trial as a matter of right, upon mere motion, and without any special cause shown therefor. Under that state of facts, and in that class of cases, we think the decision was right, and we affirm it. This case, however, is a very different one.

Here the defendants were jointly indicted for an offense of which one might be guilty and all the others innocent. This is one of the other class of cases referred to in the statute. The defendants stated that they wished to use each other as witnesses on the trial. This was assigning a special reason for severing on the trial. We all from our experience know how difficult it is to have a fair trial when several parties are on trial and they are introduced as witnesses for each other. The witness cannot testify in his own favor, and he is not bound to criminate himself. Besides, the confusion of several issues being passed upon at the same time by the same jury, affecting the lives of several persons, and some of those per-

sons on the stand as witnesses, is not likely to enable the jury to do full and impartial justice to each defendant. In this case, the wife of one of the defendants was a witness, and there is a difficulty in determining from the bill of exceptions what the court ruled as to certain portions of her testimony. Even the counsel for the state, in the argument before this court, differ as to what was decided. It originates from complicating too many issues to be decided at once. The humanity of the law did not intend to deprive three men of their lives by a trial thus confusedly conducted. The court should have granted their motion to sever on their trials, and then the attention of the court, counsel, and jury could have been fixed upon the party on trial; and justice would much more likely be attained in this manner than by the course pursued on the trial. In a case of this sort, the fact that the defendants wished to use each other as witnesses ought to have been sufficient special reason for severing on the trial, even if the court had the right to refuse it without special cause shown, and we would have felt bound to reverse his ruling on this point as a matter of discretion. The court must so use his discretion as not to abuse it; and if he improperly use his discretion, this court will control it. But, as a general rule, we hold that in all cases where parties are indicted for an offense which does not require the joint act of two or more to constitute the offense, the defendants, upon application, have a right to be tried separately. The rule is otherwise in those cases which require the concurrence of two or more in their commission. In cases of this class, the matter is subject to the legal discretion of the court before whom the trial takes place.

3. The remark of the judge in ruling out a question asked by the state's counsel, "that Horne had a right to be mad; he thought anybody shot had a right to be mad," was improper; and such an impropriety as we should be constrained to correct, if there were no other error in the case. It was certainly an intimation by the judge during the progress of the cause as to the guilt of the accused; and would make it obligatory upon this court to grant a new trial: Rev. Code, sec. 3183. Horne had no right to be mad unless he had been wronged; and whether defendants had wronged him or not, and if so, of how great a degree was that wrong, was the issue then upon trial. The judge should discharge his duties with impartiality. Let him so administer the law that it may appear, as indeed his feelings should be, that it is wholly indifferent

to him which party may succeed, provided the law is administered. Justice is represented as blind, so that she may not know either party, and with a firm hand hold the scales even. The jury should not from any conduct or word of the judge be able to know what he thinks the verdict should be. Let him discharge with impartiality those duties which the law imposes upon him, and leave the jury free to perform those imposed upon them, according to law and the facts of the case.

Judgment reversed.

OBJECTION TO INDICTMENT NOT TAKEN BEFORE VERDICT COMES TOO LATE: See *State v. Shippey*, 88 Am. Dec. 70, note 75, where other cases are collected.

IT IS ERROR FOR COURT TO EXPRESS OPINION TO JURY as to the weight or sufficiency of the testimony upon any fairly controverted or debatable question of fact: *Hill v. State*, 86 Am. Dec. 736, note 740; *People v. King*, 87 Id. 95, note 102, where other cases are collected.

SOUTHERN EXPRESS COMPANY v. PURCELL.

[37 GEORGIA, 102.]

NOTHING EXCEPT ACT OF GOD OR PUBLIC ENEMY WILL EXCUSE COMMON CARRIER for loss of goods intrusted to him for transportation, and he cannot, in Georgia, limit that legal liability by any notice given either by publication or by entry on receipts given or tickets sold; but he may limit his liability by express contract, independent of his receipt, fairly made between the parties.

WHERE EXPRESS CONTRACT IS ENTERED INTO BETWEEN COMMON CARRIER AND SHIPPER of goods, limiting the former's legal liability for loss thereof, evidence tending to show that the loss occurred through the shipper's failure to perform his contract, and not through the carrier's negligence, is admissible on behalf of the carrier.

ACTION against common carrier. The facts are stated in the opinion.

William T. Gould and William Dougherty, for the plaintiff in error.

H. W. Hilliard, for the defendant in error.

By Court, WARNER, C. J. This is an action brought against the defendant as a common carrier for the loss of thirty-three bales of cotton. The errors complained of are, that the court below refused to grant a new trial upon the several grounds specified in the record. The first assignment of error that we will now consider and decide is, that the court below erred in

charging the jury "that the receipt offered in evidence was not a special contract binding on the plaintiff." The decision of this question involves the liability of a common carrier in this state, as well as the extent to which he may limit his legal liability under the laws thereof. What is the legal liability of a common carrier in case of the loss of goods intrusted to him as such, under the laws of this state? By section 2039 of the revised code, it is declared that "any person undertaking to transport goods to another place for a compensation is a carrier, and as such is bound to ordinary diligence." Section 2040 of the revised code declares that "one who pursues the business constantly or continuously for any period of time or any distance of transportation is a common carrier, and as such is bound to use extraordinary diligence. In cases of loss, the presumption of law is against him, and no excuse avails him unless it was occasioned by the act of God or the public enemies of the state."

1. The legal liability of a common carrier by the laws of this state, therefore, in case of the loss of the goods intrusted to him, is clearly and explicitly defined, and no excuse will avail him unless such loss was occasioned by the act of God or the public enemies of the state. Thus is the law written and positively declared by the supreme power of the state. We have thus shown what is the legal liability of a common carrier in this state in case of the loss of the goods. The next question that presents itself is, How far, to what extent, and in what manner can such common carrier limit that liability imposed upon him by the law? It is contended in this case that the defendant has limited his legal liability in his receipt given for the cotton to the plaintiff. To give such a construction and effect to the receipt as is contended for would be to allow the defendant to limit and regulate his legal liability as a common carrier, in express contravention of the law which imposes it upon him. The defendant's liability as a common carrier is regulated by law upon the grounds of public policy, and he cannot be permitted by his own act to limit the effect and operation of that law, and thereby defeat that public policy. It was the duty of the defendant as a common carrier to obey the law in regard to his liability as such, and not to attempt to make it for his own protection. But section 2042 of the revised code expressly declares that "a common carrier cannot limit his legal liability by any notice given, either by publication, or by entry on receipts given or tickets sold.

He may make an express contract, and will then be governed thereby." The legal liability of a common carrier as defined by the law is one thing; his legal liability as a common carrier under an express contract made by the shipper is another and quite a different thing. In the latter case his liability will depend upon the terms of that express contract, and will be governed by it. But such express contract limiting his legal liability as a common carrier cannot be proved by a notice given, either by publication, or by an entry on the receipt given for the goods or tickets sold. The express contract made with the shipper of the goods, limiting the legal liability of the common carrier, must be made independently of the receipt given for the goods, and be proved independently thereof, as any other contract is proved when entered into by two or more parties to it. The common carrier receipts the shipper for the goods, and the law fixes his liability therefor in case of loss; but the common carrier and the shipper may enter into an express contract, outside of the receipt given for the goods, in regard to the carrier's liability, and then both parties, having a fair opportunity to understand the terms of the contract, will be governed by it. Such, in our judgment, is a fair and legitimate interpretation of the code in relation to the liability of common carriers in this state.

2. The next ground of error assigned upon the record is, that the court erred in charging the jury, "that if the contract was made as testified by the witness Sylvester, it was still incumbent on the defendant to prove that there was no negligence on their part." The effect of this charge, in our judgment, was to exclude from the consideration of the jury the question in dispute, whether the cotton was destroyed by the negligence of the defendant or by the failure of the plaintiff to perform his part of the express contract, if they should believe such a contract was made. In view of the facts of this case as disclosed by the record, we think that the court below erred in not charging the jury, in addition to the charge as given, that if they should believe from the evidence that there was an express contract made between the plaintiff and defendant outside of and independent of the receipt given for the cotton, as testified to by the witness Sylvester, and that the cotton was destroyed by fire in consequence of the failure of said plaintiff to perform said contract on his part, then the defendant was not liable for the loss of the cotton. It is true that the defendant as a common carrier is liable under the

law for negligence. Whether the cotton was destroyed by the negligence of the defendant in this case, or by the failure of the plaintiff to perform his contract with the defendant in relation to its transportation (if any such contract was made), is the question for the jury to determine, under the evidence and the charge of the court upon that point. Upon this last ground we reverse the judgment of the court below and grant a new trial.

Judgment reversed.

COMMON-LAW LIABILITY OF COMMON CARRIER: See *Agnew v. Steamer Contra Costa*, 87 Am. Dec. 87, note 90, where other cases are collected; *Read v. Spaulding*, 86 Id. 427, note 433; *Michaels v. New York C. R. R. Co.*, 86 Id. 415, note 426; *Merritt v. Earle*, 86 Id. 292, note 296; *Hooper v. Wells, Fargo, & Co.*, 85 Id. 211; *Bland v. Adams Ex. Co.*, 85 Id. 623; *Arnold v. Jones*, 82 Id. 617, note 618, where other cases are collected.

POWER OF CARRIER TO LIMIT HIS COMMON-LAW LIABILITY BY SPECIAL CONTRACT: See *Baltimore and Ohio R. R. v. Rathbone*, 88 Am. Dec. 664, note 667; *Illinois Central R. R. Co. v. Smyser*, 87 Id. 301, note 304; *Adams Express Co. v. Nock*, 87 Id. 510, note 512; *Hooper v. Wells, Fargo, & Co.*, 85 Id. 211, note 230; *Pennsylvania R. R. Co. v. Schwartzberger*, 84 Id. 490, note 493; *Judson v. Western R. R. Corp.*, 83 Id. 646, note 651, where other cases are collected; and see note to *Cole v. Goodwin*, 82 Id. 498, where this subject is discussed.

AYCOCK v. MARTIN.

[87 GEORGIA, 124.]

BINDING FORCE AND COERCIVE POWER OF LAW APPLICABLE TO CONTRACT at the time it was made constitute the obligation of the contract. This obligation, which is a legal and not a merely moral one, does not inhere in the contract itself, *proprio vigore*, but in the law applicable to the contract.

GEORGIA STAY LAW OF DECEMBER 13, 1866, IMPAIRS OBLIGATION OF CONTRACTS made prior to its enactment, because it prohibits a plaintiff from exercising his legal right to enforce a defendant's legal obligation to perform his contract as the same existed under the old law creating and defining that legal obligation at the time the contract was made, under the penalty of being a trespasser; and is therefore in violation of the constitution of the United States and of the state of Georgia.

FOUR cases involving the question of the constitutionality of the stay law. The provisions of the law are stated in the opinion.

Wofford, Parrott and Coxe, Mathews and Reid, H. Fielder, and B. H. Bigham, for the plaintiffs in error in the several cases.

Warren Akin, Linton Stephens, A. Hood, and B. H. Hill, for the defendants in error.

By Court, WARNER, C. J. The question made by the record in this case involves the constitutionality of the act of the legislature passed on the 13th of December, 1866, commonly known as the stay law. The constitution of the United States declares that "no state shall pass any law impairing the obligation of contracts." The constitution of the state of Georgia declares that "*ex post facto* laws, laws impairing the obligation of contracts, and retroactive laws, injuriously affecting any right of the citizen, are prohibited." The constitution of the state of Georgia further declares that "legislative acts in violation of the constitution are void, and the judiciary shall so declare them." Thus it will be seen that if the act of the 13th of December, 1866, is in violation of the constitution of the United States and the constitution of the state of Georgia, or either of them, then this court is bound so to declare, by its judgment, under the most solemn obligations that can be imposed; indeed, it has no discretion in the matter but to obey the stern mandate of the supreme law of the land.

The first inquiry, therefore, which is presented for our consideration and judgment is, Does the act of the legislature of the 13th of December, 1866, impair the obligation of the contract between the parties in this case, as prohibited by the constitution of the United States? The constitution, it will be perceived, does not prohibit the states from passing laws impairing contracts. The prohibition is expressly directed against laws which impair the obligation of contracts. What is the obligation of a contract as contemplated by the constitution? "The obligation of a contract is a legal, not a mere moral, obligation; it is the law which binds a party to perform his undertaking. The obligation does not inhere or subsist in the contract itself, *proprio vigore*, but in the law applicable to the contract": 1 Bouvier's Law Diet. 652, and authorities there cited. When the parties entered into the contract now before the court which the plaintiff seeks to enforce, what was the legal obligation of the defendant? His legal obligation was, to do and perform just what the laws of the land, applicable to the contract, required him to do and perform at the time the contract was made, in accordance with its terms and stipulations; that was the exact measure of his legal obligation at the time the contract was made,—nothing more, nothing less. The defendant's legal obligation was to perform his contract as the laws of the land applicable to that contract required him to perform it at the time it was made. That was the ex-

tent of his legal obligation to the plaintiff, and just to that extent the plaintiff had the legal right to have it performed, in order to maintain the integrity of the legal obligation of the defendant's contract. If it was not the existing law of the state, applicable to the contract at the time it was made, which created and defined the defendant's legal obligation to perform it, in accordance with its terms and stipulations, what is it that does create and define his obligation to perform it? If there had been no existing law applicable to the contract prescribed by the supreme power of the state at the time it was made, creating and defining the defendant's obligation to perform it, then he would have incurred no other than a mere moral obligation, over which human tribunals have no jurisdiction. It therefore necessarily follows that the existing law applicable to the contract prescribed by the supreme power of the state, at the time the contract was made, creates and defines the defendant's legal obligation to perform it in accordance with its terms and stipulations. "A perfect right is that which is accompanied by the right of compelling those who refuse to fulfill the correspondent obligation. A perfect obligation is that which gives to the opposite party the right of compulsion": Vattel, 62. The defendant's obligation to perform his contract in accordance with its terms was a perfect obligation, because the plaintiff, at the time the contract was made, had the legal right under the then existing law of the state to have compelled its performance. The defendant's obligation to perform his contract was just what that existing law made it, just what that existing law required and would have compelled to be done for its performance, in behalf of the plaintiff, the other party to it. The defendant's obligation to perform his contract, under the then existing law, was perfect, and the plaintiff's right to have that obligation performed as prescribed by that existing law was also a perfect right.

Having shown that the defendant, by the terms and stipulations of his contract, had imposed upon himself a perfect legal obligation to perform it, and that the plaintiff had a perfect legal right to have that legal obligation performed in accordance with the existing law which created and defined that obligation, let us now inquire what acts of the legislature will impair the legal obligation of contracts within the constitutional prohibition. In the case of the justices of the inferior court of *Morgan County v. Sparks*, 6 Ga. 439, this court have answered the question in the most explicit terms. The

court say in that case: "The objection to a law on the ground of its impairing the obligation of a contract does not depend on the extent of the change which the law may make in it. Any deviation from its terms by postponing or accelerating the period of performance which it prescribes, or imposing conditions not expressed in the contract or dispensing with the performance of those which are, however minute or apparently immaterial in their effect upon the contract of the parties, impairs its obligation, and consequently is within the constitutional prohibition." Although the constitutionality of the stay law was not involved in that case, yet the legal rule applicable to acts of the legislature impairing the obligation of contracts was correctly stated, and was again reiterated in *Winter v. Jones*, 10 Ga. 195 [54 Am. Dec. 379]. We have endeavored to show what was the extent of the defendant's legal obligation to the plaintiff at the time the contract was made. We have shown what is the rule of law applicable to this particular class of cases, as asserted and recognized by this court. Now let us examine the act of the 13th of December, 1866, and see whether, according to the rule recognized by this court (as well as all other courts where the laws of the land are independently and impartially administered), that act impairs the legal obligation of the contract between the parties in this case. The act is declared to be "An act for the relief of the people of Georgia, and to prevent the levy and sale of property under certain circumstances." The first section of the act declares "that there shall be no levy and sale of property of defendants in this state under any execution founded on any judgment, order, or decree of any court, heretofore or hereafter to be rendered upon any contract or liability made or incurred prior to the 1st of June, 1865, or in renewal thereof, though bearing a subsequent date, except in the following manner: For one third of the principal and interest due on said execution, and no more, which may be levied on or after the first of January, 1868, one third of the whole on or after the 1st of January, 1869, and the remaining one third on or after the 1st of January, 1870, unless the defendant shall indorse on the execution a waiver of the benefit of this act." The fourth section of the act further declares "that any officer or other person violating this act shall be guilty of trespass, and liable to the defendant or person injured in damages not less than the amount of the judgment, order, or decree upon which he is proceeding, as in other cases of trespass."

The existing law of this state at the time the contract was made between the parties, on which this judgment and execution is founded, and which the plaintiff is seeking to enforce, imposed the legal obligation upon the defendant to perform it in accordance with its terms and stipulations. That legal obligation was in full force, and binding upon him, on the thirteenth day of December, 1866, when the act in question was passed. Does the act of the 13th of December, 1866, postpone the performance of that legal obligation? If it does, then in the explicit words of this court, before cited, it impairs the legal obligation of the contract. Does the act of 1866 impose conditions upon the parties not expressed in the contract, or in the law applicable to the contract at the time it was made? If it does, then, according to the same authority, it impairs the legal obligation of the contract. Does the act of 1866 dispense with the performance of any part of the legal obligation of the defendant to perform his contract, as that legal obligation existed under the law at the time of its enactment? If it does, then, according to the well-established rule of law recognized and declared by this court in the two cases before cited, it impairs the legal obligation of the contract.

Now, in what manner does the act of 1866 impair the legal obligation of the defendant's contract? At the time of the passage of that act, the defendant's legal obligation to pay the debt included in the judgment was upon him in all its force and effect as the same existed under the law at the time the contract was made.

Now, by the act of 1866, he is relieved from the performance of that legal obligation until the first day of January, 1868, absolutely, and for two thirds thereof until the first day of January, 1869, and for one third thereof until the first day of January, 1870. That act expressly declares that the defendant's legal obligation to perform his contract shall not be enforced by the process of the court until the first day of January, 1868, and after that time only in the manner before stated. To that extent the defendant is relieved from the performance of his legal obligation to the plaintiff, as the same existed under the law at the time the contract was made, by the act of 1866. The fourth section of that act also declares that any officer or other person (which includes the plaintiff) who shall violate the provision of the act of 1866 shall be guilty of trespass, and liable to the defendant in damages, etc. Thus it will be perceived that by the act of 1866 the

defendant is not only relieved from his legal obligation to the plaintiff to perform his contract for a definite period of time, but that any officer or other person who shall enforce the performance of the defendant's legal obligation, within that time, to perform his contract, as the same existed at the time the contract was made, shall be guilty of trespass and punished as a trespasser. The act not only relieves the defendant from his legal obligation to perform his contract with the plaintiff in the manner specified therein, but actually declares that the plaintiff shall be guilty of trespass if he shall enforce the performance of the defendant's legal obligation to perform his contract, imposed by the laws of the state at the time the contract was made. The legal obligation of the contract is impaired by relieving the defendant from its performance as expressed in the act. The legal obligation of the contract is impaired, because the plaintiff cannot enforce the defendant's legal obligation to perform it, without being a trespasser and liable for damages under the act. Before the passage of the act of 1866, the defendant was under a legal obligation, then resting upon him in its full force, to perform his contract. Is that legal obligation to perform his contract with the plaintiff as binding upon him now as it was before the passage of that act? or is that legal obligation less binding upon him now than it was then? The law of the state applicable to the contract as it existed at the time the contract was made constituted, as we have shown, the exact measure of the defendant's legal obligation to perform it in accordance with its terms and stipulations. Is that legal obligation of the defendant to perform the contract the same now under the legislative enactment of the 13th of December, 1866, as it was at the time the contract was made? Is the legal obligation of the defendant to perform his contract now as strong and binding upon him as it was when the contract was made? If it is, then he obtains no relief from the performance of his legal obligation to the plaintiff under the contract, and the act of 1866 does him no good, confers no benefit upon him whatever, and the legal obligation of the contract is not impaired. If, however, the defendant's legal obligation to perform his contract is not now as strong and binding upon him as it was when the contract was made, what is it that makes that legal obligation to perform it less strong and less binding upon him? Most unquestionably it is the provisions of the act of 1866, which declares that the defendant's legal

obligation to perform that contract, as the same existed at the time the contract was made, shall not be enforced by the levy and sale of his property under any execution founded on any judgment rendered upon that contract, until the 1st of January, 1868, then only one third thereof, and the remaining two thirds on the 1st of January, 1869, and the 1st of January, 1870, respectively. The act postpones the ultimate performance of the defendant's legal obligation of his contract until the 1st of January, 1870. The act of 1866 prescribes conditions for the performance of the defendant's legal obligation prejudicial to the rights of the plaintiff, which did not exist under the laws of the state creating and defining that legal obligation at the time the contract was made. Will any honest, fair-minded man undertake to say, when we take into consideration the defendant's legal obligation to perform his contract, as that legal obligation existed under the law at the time the contract was made, and his legal obligation to perform it now according to the provisions of the act of 1866, that his legal obligation to perform that contract has not been postponed, altered, weakened, and impaired by that act? One fact is quite apparent at least, that the defendant's legal obligation to perform his contract under the provisions of the act of 1866 is not the same as it was under the law applicable to the contract at the time it was made, and the question is, whether that act impairs that legal obligation.

But the argument for the defendant is, that the act of 1866 only affects the remedy, and that the remedy is no part of the contract, therefore it is not within the constitutional prohibition. The reply is, that the constitution does not prohibit the legislature from passing laws impairing contracts. The constitution declares that "no state shall pass any law impairing the obligation of contracts." Whether the defendant's legal obligation to perform his contract with the plaintiff has been impaired by the legislature under the name or form of a remedy, or any other name, makes no difference; the question still remains to be answered, Does the act of 1866 impair the legal obligation of the defendant's contract with the plaintiff? That the legislature may pass remedial statutes is readily conceded, provided always that such remedial statutes do not impair the legal obligation of contracts. A statute of limitation does not affect or impair the legal obligation of the contract; it merely prescribes the time within which that legal obligation shall be enforced; the obligation itself remains

intact. Acts of the legislature abolishing imprisonment for debt, as well as acts exempting certain property from sale under execution, have been held not to be within the constitutional prohibition, for the reason that such acts merely modified the remedy, but did not touch or interfere with the legal obligation to perform the contract; that legal obligation to perform the contract still remaining in full force, and binding upon the parties as the same existed at the time the contract was made. This class of cases does not necessarily limit, postpone, restrict, or impair the binding force of the legal obligation to perform the contract as the same existed at the time it was made, but simply declares the manner in which that legal obligation shall be enforced; the legal obligation to perform the contract according to its terms and stipulations remaining untouched. A remedial statute, however, is as much a law as any other statute, and is as much within the constitutional prohibition as any other statute, where it impairs the legal obligation of contracts.

Under ordinary circumstances and in prosperous times, this would be considered a plain proposition; but we are told by high authority that "God hath made men upright, but they have sought out many inventions." It was doubtless the object of the framers of the constitution to protect the legal obligation of contracts from the subtle inventions of remedial law-makers as well as all others. It has been contended that it is competent for the legislature, under the constitution, to regulate the remedy to enforce the legal obligation of contracts, provided some remedy is left, but that it would be unconstitutional to deprive a party of all remedy to enforce the legal obligation of his contract. If it would be a violation of the constitution to deprive a party of all remedy to enforce the legal obligation of his contract, what clause of the constitution would such legislation violate? If it would be a violation of that clause of the constitution which declares that "no state shall pass any law impairing the obligation of contracts," why is it not equally as unconstitutional to enact a law which postpones, alters, imposes conditions, or dispenses with the performance of that legal obligation for a definite period of time, as it would be to defeat the performance of that legal obligation by withdrawing all remedy for its enforcement? It is a question of degree only: the one destroys the legal obligation to perform the contract, by preventing its enforcement; the other only impairs it. According to the interpretation

given to this clause of the federal constitution by the supreme court of the United States, we do not entertain a doubt that the act of 1866 would be held by that court to be within the constitutional prohibition; and in our judgment, the decisions of that tribunal upon questions arising under the constitution of the United States are binding authority upon the courts of this state: *Sturges v. Crowninshield*, 4 Wheat. 191; *Green v. Biddle*, 8 Id. 1; *Bronson v. Kinsey*, 1 How. 311; *McCracken v. Hayward*, 2 Id. 608.

But this act of 1866 expressly operates upon the legal obligation of contracts made before its passage, and to that extent is retroactive, and is expressly prohibited by the constitution of the state of Georgia. Neither by the constitution of the United States nor by the old constitution of this state are retrospective laws or retroactive laws prohibited. This was considered an evil which the people of Georgia in adopting their new constitution intended to remedy and prohibit. If the framers of the new constitution did not intend to prohibit the legislature from passing retroactive laws operating upon the legal obligation of past contracts which might injuriously affect any right of the citizen, it is extremely difficult for this court to say what they did intend. To maintain the integrity of the fundamental law of the state is one of the highest and most sacred duties of every court. Unless this shall be done faithfully and independently, there is no security for the protection of either persons or property. In *Vanhorn v. Dorrance*, 2 Dall. 304, the supreme court of the United States, soon after the organization of the federal government under the constitution, announced the true legal rule upon this subject: "The constitution is stable and permanent, not to be worked upon by the temper of the times, nor to rise and fall with the tide of events; notwithstanding the competition of opposing interests and the violence of contending parties, it remains firm and immovable, as a mountain amidst the strife of storms, or a rock in the ocean amidst the raging waves. It is a clear position, that if a legislative act oppugns a constitutional principle, the former must give way and be rejected on the score of repugnance. It is a position equally clear and sound that in such cases it will be the duty of the courts to adhere to the constitution, and to declare the act null and void. The constitution is the basis of legislative authority; it lies at the foundation of all law, and is a rule and commission by which both legislators and judges are to proceed. The constitution fixes limits to the

exercise of legislative authority, and prescribes the orbit in which it must move. Whatever may be the case in other countries, yet in this there can be no doubt that every act of the legislature repugnant to the constitution is absolutely void." It has been justly remarked by an eminent civilian that "to attack the constitution of the state and to violate its laws is a capital crime against society; and if those guilty of it are invested with authority, they add to this crime a perfidious abuse of the power with which they are intrusted": Vattel, 9, sec. 30.

The conclusion of the majority of the court in this case therefore is, both upon principle and authority, that the binding force and coercive power of the law applicable to the contract as the same existed at the time it was made constitutes the obligation of the contract. The defendant was legally bound by that existing law to perform it in accordance with its terms and requirements, and the plaintiff had the legal right under that existing law to enforce the performance of that legal obligation. Any subsequent act of the legislature, therefore, remedial or otherwise, which alters or changes the then existing law which created and defined that legal obligation to such an extent as to make its legal force and power less binding upon the defendant to perform it, postponing or obstructing its enforcement, or imposing conditions for its performance not prescribed by the law which created and defined that legal obligation at the time the contract was made, necessarily impairs it, and is prohibited by the constitution.

But it is said the act of 1866 affects only the remedy, and therefore is not within the constitutional prohibition. The pertinent inquiry is, How does the proposed remedy affect the legal obligation of the contract at the time it was made? Does it impair it, or not? This is the vital question in the case to be answered. The act of 1866, it will be perceived, creates a new and different obligation for the performance of the contract from that imposed on the defendant by the existing law at the time the contract was made. The legal obligation to perform the contract which existed under the old law at the time the contract was made is postponed until the 1st of January, 1868, absolutely, and conditionally until the 1st of January, 1870. The binding force of the legal obligation to perform the contract, and the coercive power of the law to compel its performance, which existed at the time the contract was made, is less strong and less binding upon the defendant

now, under the provisions of the act of 1866, than it was then, as will readily be perceived by reference to the act. The act of 1866 prescribes conditions for the performance of the legal obligation of the contract, which were not prescribed by the old law applicable to the contract at the time it was made, to the injury of the plaintiff's rights arising under and secured by that old law creating and defining that legal obligation. The act of 1866 prohibits the plaintiff from exercising his legal right to enforce the performance of the defendant's legal obligation to perform his contract as the same existed under the old law creating and defining that legal obligation at the time the contract was made, under the penalty of being a trespasser. The act of 1866 does all these things, which, in the judgment of a majority of this court, the constitution of the United States and the constitution of the state of Georgia expressly prohibit from being done, either under the name or form of a remedial law, or any other law of like character producing the same practical effect. The judgment of the majority of this court therefore is, after the most careful examination of this question, that the act of the 13th of December, 1866, impairs the obligation of the contract between the parties in this case, as the same existed under the law prescribed by the supreme power in this state, at the time the contract was made, which being expressly prohibited by the constitution, the said act is therefore null and void.

Let the judgment of the court below be affirmed.

HARRIS, J., concurred in the opinion of Warner, C. J. The learned judge, after stating briefly the provisions of the stay laws of March 12, 1866, and of December 13, 1866, under consideration, proceeded to ascertain what were the mischiefs which led the patriot statesmen of the Revolution to insert the prohibition contained in the constitution of the United States against laws impairing the obligation of contracts. In discussing this question, he cited and quoted from Chief Justice Marshall's opinions in *Sturges v. Crowninshield*, 4 Wheat. 191, and *Ogden v. Saunders*, 12 Id. 213. He then said: "Here I might stop, as I have shown that a chief evil or mischief which led to the adoption of the prohibition of the constitution was the laws of the states directing judgments to be paid by installments; and as the acts of 1866 for the payment of executions by annual installments are identical in character, they are necessarily within the prohibition of the constitution; but as stay laws in some form or other are likely to be again attempted, with an expectation of their being sustained by a corrupt judiciary, regardless of their oaths to support the constitutions of the United States and of the state of Georgia, a fuller examination of the several clauses of them bearing on the questions which the record suggests cannot be without utility in demonstrating the wholesome (however unwelcome) truth which the people should learn at the

earliest moment, that all stay laws, however cunningly and evasively framed, operating retrospectively upon judgments and contracts, so as to delay and hinder their collection, or designed to impede the courts in the performance of their healthful and accustomed functions under the constitutions, are fraudulent and dishonest violations of those constitutions which their legislators as well as their judges are solemnly sworn to obey." He then proceeded to examine the meaning of the words "impairing the obligation of contracts." From the definitions given by Chief Justice Marshall, he concluded that "the binding law and the obligation are convertible terms." He held that the attempted distinction between the obligation of the contract and the remedy for its enforcement is unsound, and that so far from being separate and distinct, they are identical. The learned judge said that the distinction between the obligation of the contract and the remedy for its enforcement taken by Chief Justice Marshall in *Sturges v. Crowninshield*, *supra*, has not been approved by some of the most eminent jurists of this country. In support of this statement, he referred to 1 Kent's Com. 456; *Mather v. Bush*, 16 Johns. 252. After referring to 3 Story on Constitution, 250, and the cases there considered, he said: "I venture to say that if an honest application of the principles enunciated in these cases is made to the stay laws of 1866, or indeed to any stay laws which a legislature may enact, operating upon existing contracts so as to delay or hinder the creditor in the collection of his debt, they cannot but be pronounced unconstitutional." And further on he added: "If these laws act on existing remedies materially so as to lessen their value, or impose new conditions upon them, they are unconstitutional." He also held that the acts of 1866 are violative of the state constitution because they were passed subsequent to the executions of the plaintiffs, and they act upon them in such a manner as to injuriously affect their rights. The learned judge then proceeded to show that the stay laws of 1866, above referred to, are violative of the clauses of the state constitution distributing the powers of government among the three departments thereof, and prohibiting the exercise by the legislature of any of the powers belonging to the judiciary; and that the legislature has no power to alter or modify any judgment of the superior courts of the state, or by law to arrest or suspend the enforcement of such judgments. The conclusion reached by him is thus stated: "The logical conclusions, therefore, to be drawn from these clauses of the state constitution are, that the legislature cannot enjoin the officers of a court from the performance of the mandates of the court, or in any manner interfere with the enforcement of the judgments of the court by legislative action, direct or indirect, on the plaintiffs in execution, the sheriff, or the court; and that all retroactive laws enacted to accomplish any of these ends are palpable usurpations of power, violative of the constitution itself, and if not promptly and firmly arrested by the judiciary when called on to construe them, will lead to the overthrow of our present form of government."

WALKER, J., delivered a dissenting opinion. He expressed his regret that there should be a division of opinion in the court upon so important a constitutional question. The question under consideration was, he said, an open one in Georgia. In North Carolina, South Carolina, Alabama, Tennessee, and Mississippi, stay laws have been decided to be unconstitutional; while in Pennsylvania, Iowa, Wisconsin, Maine, and Kansas a contrary doctrine has been adopted. The power of the courts to declare a law clearly unconstitutional, inoperative, and void, while undoubted, should be exercised with great caution: *Winter v. Jones*, 10 Ga. 195; S. C., 54 Am. Dec. 379; *Van Hoffman v. City of Quincy*, 4 Wall. 549; *Cary v. Giles*, 9 Ga. 258; *Boston v.*

Warrens, 16 Id. 102; S. C., 60 Am. Dec. 353; *Cooper v. Telfair*, 4 Dall. 19. His honor then gave a history of stay-law legislation in the state, showing that in 1860 the general assembly passed over the executive veto the first stay law, which was re-enacted in 1861, in 1862, in 1863, and in March, 1865. In November, 1865, the people represented in convention passed a stay law, "until the adjournment of the first session of the next legislature." In March, 1866, and in December, 1866, the legislature passed the stay law over the executive veto. This legislation, he argued, showed a settled policy on the part of the people in favor of a stay law. He next recounted the causes that led to the enactment of these laws, and referred to the impoverished condition of the people growing out of the events of the recent war. After reviewing at some length the authorities on the different sides of the question, the learned judge expressed his inability to understand how the law can constitute any part of the contract. And said he: "If the law does not constitute a part of the contract, I cannot see how a change of the law can be said to impair the obligation of the contract." After referring to numerous decisions in other states sustaining laws, abolishing imprisonment for debt, and exempting property of the debtor from execution, he said: "What I contend for is, that the legislature, when it may deem it for the welfare of the state, shall have power to suspend for a reasonable length of time the remedy which it has furnished for the enforcement of compensation for broken contracts. . . . The legislature has not interfered with the obligation of the contract; that remains unchanged. It has simply suspended for a given time the application of the remedy. Such legislation was deemed necessary for the public welfare; and in my opinion, the law-making power did not transcend its constitutional limits; did not thereby impair the obligation of contracts." His honor referred briefly to the cases relied upon by the majority of the court, claiming that in none of them was the question of the validity of stay laws involved, and that it was only upon the *dicta* of judges in those cases that the majority of the court relied for "authority" to set aside a series of acts of the legislature running through a period of six years. In answer to the position that stay laws are obnoxious to the clause in the constitution which prohibits "retroactive laws injuriously affecting any right of the citizen," he contended that this court had decided that the object of this clause of the constitution was to prevent the legislature from divesting vested rights. And he added: "But I deny that any one has a vested right in any particular remedy." The learned judge reached the conclusion that a stay law is not such a retroactive law as the constitution prohibits.

LAWS IMPAIRING OBLIGATION OF CONTRACTS ARE VOID: See *Trustees v. Bailey*, 81 Am. Dec. 194, note 201, where other cases are collected; *Scobey v. Gibson*, 79 Id. 490, note 495.

OBLIGATION OF CONTRACT CONSISTS IN ITS BINDING FORCE on the party who makes it, and this depends on the laws in existence when it is made: *Outts v. Hardee*, 38 Ga. 383, citing the principal case.

STAY LAWS, CONSTITUTIONALITY OF: See *Bailey v. Gentry*, 13 Am. Dec. 493, where this subject is discussed. Stay laws are unconstitutional and void: *Chapman v. Akin*, 39 Ga. 350; *Battle v. Shivers*, 39 Id. 416, both citing the principal case.

SOLOMON v. PETERS.

[87 GEORGIA, 251.]

MOTION TO DISMISS BILL IN EQUITY CANNOT BE HEARD AND DETERMINED IN VACATION, except by virtue of an order passed in term time authorizing the hearing in vacation.

LAW REQUIRING OFFICER LEVYING ON REAL ESTATE TO GIVE WRITTEN NOTICE OF LEVY to the tenant in possession is directory to the officer, and a failure to give such notice does not affect the title acquired by a *bona fide* purchaser under the levy.

PURCHASER AT SHERIFF'S SALE HAS ONLY TO SEE THAT OFFICER HAD COMPETENT AUTHORITY to sell, and did sell, and that the defendant in execution had title to the property sold.

MOTION to dissolve an injunction, and to dismiss the bill. The judge would not entertain the motion to dismiss at chambers, and refused to dissolve the injunction. The other facts appear from the opinion.

Hill and Candler, for the plaintiffs in error.

L. J. Glenn and Son, and *L. E. Bleckley*, for the defendants in error.

By Court, WALKER, J. 1. The court very properly declined to hear in vacation the motion to dismiss the bill. Such a motion involved a decision of the merits of the bill; in other words, a trial of the merits of the case as made by complainant, and should be heard only at term time, or in vacation by virtue of an order passed in term time authorizing the hearing in vacation.

2. The alleged equity of the bill as amended consists in the charge of a failure by the sheriff to give the notice of the levy as required by section 3596 of the revised code. There is no charge that Solomon, the purchaser, had any notice of such failure, nor indeed, that he has done anything to make him otherwise than a *bona fide* purchaser. Such being the case, the failure of the sheriff to notify the tenant cannot affect him.

3. It is sufficient for the purchaser that the sheriff had competent authority to sell, and did sell, and that the defendant in *fi. fa.* had title to the property sold. The law requiring notice to be given, property advertised, etc., is directory to the officer. His neglect to observe these requirements may subject him to a suit for damages at the instance of any party injured thereby, but will not affect the title of a *bona fide* purchaser at his sale. The purchaser may presume that the sheriff has taken all the steps required by law to make the

sale valid. He has the authority to sell, the law prescribes his duties, he swears to execute all processes placed in his hands according to law, and the *bona fide* purchaser may rely upon his fidelity in the performance of his duties: *Brooks v. Rooney*, 11 Ga. 423 [56 Am. Dec. 430]. There being no charge of fraud against Solomon, he was entitled to the property purchased, and the court should have dissolved the injunction.

Judgment reversed.

PURCHASER AT EXECUTION SALE NEED NOT SHOW COMPLIANCE BY OFFICER with the requirements of law regarding notice of sale: *Hendrickson v. St. Louis & I. M. R. R. Co.*, 84 Am. Dec. 78, note 78, where other cases are collected.

PURCHASER AT EXECUTION SALE NEED ONLY SEE THAT OFFICER HAS VALID EXECUTION: See *Hendrickson v. St. Louis & I. M. R. R. Co.*, 84 Am. Dec. 76; *Sydnor v. Roberts*, 65 Id. 84, note 94, where other cases are collected.

WALLACE v. WALKER.

[87 GEORGIA, 265.]

COURT OF EQUITY MAY SET ASIDE JUDGMENT OF COURT OF ORDINARY granting letters of administration, where such judgment was procured by a party who fraudulently represented to the court that the deceased died intestate, when he knew that the deceased died leaving a will in another state. And the suit to set aside such letters of administration thus fraudulently procured may be maintained by the executor appointed by a probate court of the state where the testator died, upon his filing an exemplified copy of his appointment in court; and the defendant may be required to pay over to such foreign executor the value of the personal assets belonging to the estate of the decedent, to be duly administered according to the directions of the will and the law of the place of the testator's domicile at the time of his death.

BILL in equity. The opinion states the case.

Gartrell and Jackson, and W. H. Sneed, for the plaintiff in error.

John L. Hopkins and L. E. Bleckley, for the defendant in error.

By Court, WARNER, C. J. It appears from the record in this case that William Wallace died in the state of Tennessee after having executed a will disposing of his property. The will was executed on the twenty-sixth day of March, 1864, and duly admitted to probate and record in the probate court of Tennessee in July, 1864; and W. A. Walker, one of the executors appointed therein, was duly qualified as such executor

to execute the same. At the November term, 1865, of the court of ordinary of Fulton County, in this state, Alexander M. Wallace, knowing that the testator had left a will in the state of Tennessee (the place of his domicile at the time of his death), representing to the court that the testator had died intestate, obtained letters of administration on the estate of said William Wallace, and proceeded to collect and dispose of the personal assets of the decedent, as such administrator, in this state. The executor of William Wallace filed his bill in the superior court of Fulton County (exhibiting therewith a certified copy of the will and his appointment by the probate court of Tennessee, as required by the code), against Alexander M. Wallace, as administrator aforesaid, and John W. Duncan, his security, praying that said letters of administration may be set aside as fraudulent, upon the several grounds alleged and set forth in the bill, and the defendants may account for the personal assets of the testator received by them, and be decreed to pay over to him the value thereof, as the executor of the testator, in order that the same may be disposed by him in accordance with the provisions and directions of the last will and testament of the deceased.

To this bill the defendants demurred upon the several grounds set forth in the record. The court below overruled the demurrer, to which decision the defendants excepted, and assigned the same as error here.

As it regards the objection taken to the legality of the appointment of the executor by the probate court of Tennessee, as well as to the regularity of the proceedings of that court in relation thereto, the legal presumption is in favor of the legality and regularity of the proceedings of that court: Rev. Code, secs. 3700, 3710. Taking the several allegations in the complainant's bill to be true, as the demurrer necessarily admits them to be, for the purpose of this decision, the main and controlling question in the case is, whether the grant of administration by the court of ordinary of Fulton County, under which the defendants claim protection, was not obtained by fraud, and therefore ought to be set aside? What are the facts? The defendant, Wallace, it is charged, applied to the ordinary for letters of administration on the estate of the deceased testator, representing to that court that he died intestate, when he knew at the time that he died leaving a will. The letters of administration were granted to him by the court of ordinary upon this false and fraudulent representation of the facts of

the case. The record shows that William Wallace did not die intestate, but on the contrary he died leaving a will, and that Wallace, the defendant, knew it at the time he applied for and obtained his letters of administration on the decedent's estate. Has a court of equity in this state jurisdiction to set aside the letters of administration so procured by fraud, and to require the defendants to account with and pay over to the lawful executor the personal assets of the testator received by them or either of them, to be applied by the executor under the will in accordance with the law of the testator's domicile at the time of his death? By section 2414 of the revised code, it is declared that "executors qualified according to the laws of their domicile upon wills properly admitted to probate in another state, upon filing with the court a certified copy of such proceedings, shall be entitled to use all the processes and remedies prescribed by the laws of this state, in the same manner as if qualified under the laws of this state." This section of the code gives the foreign executor the right to file his bill in the courts of this state against the defendants, and it is no breach of comity for him to do so. Section 3537 of the revised code declares that "the judgment of a court of competent jurisdiction may be set aside by a decree in chancery for fraud, accident, or mistake, or the acts of the adverse party, unmixed with the negligence or fault of the complainant." This judgment of the court of ordinary granting the letters of administration to the defendant, Wallace, the complainant seeks to set aside, upon the ground that by his own act he fraudulently represented to the court that the deceased testator died intestate, when he knew the fact to be otherwise, and by that means fraudulently procured the judgment of the court in his favor. In such cases this court has maintained the jurisdiction of a court of chancery to set aside the judgment: *Mobley v. Mobley*, 9 Ga. 247; *Loyless v. Rhodes*, 9 Id. 547. This view of the main question involved in this case necessarily disposes of all the other questions made by the demurrer.

It has been insisted by the counsel for the defendant in error, that the grant of administration to Wallace was void, because there had been a prior grant of letters testamentary upon the decedent's estate in the state of Tennessee. When letters testamentary or of administration have once been granted upon a decedent's estate in the proper court in this state, and subsequent letters are taken out here upon the same estate, there can be no doubt that the latter would be void;

but when letters testamentary or of administration have been granted by a court in a foreign jurisdiction, a different question is presented, upon which we express no opinion. In our judgment, upon the state of facts presented by the record in this case, the demurrer was properly overruled by the court below.

Judgment affirmed.

JUDGMENT OBTAINED BY FRAUD, WHEN EQUITY RELIEVES AGAINST: See *Dobson v. Pearce*, 62 Am. Dec. 152, note 158, where other cases are collected.

MARKHAM v. BROWN.

[27 GEORGIA, 277.]

WHERE JUSTICES OF INFERIOR COURT SEIZE AND TAKE POSSESSION OF PERSON'S PROPERTY, WITHOUT HIS CONSENT, for the purpose of providing a small-pox hospital, and occupy it for that purpose, the owner may maintain an action of trespass against them in their individual capacity, for such seizure and occupancy, notwithstanding the inferior court had power and authority to provide small-pox hospitals. The authority to establish small-pox hospitals does not give the right to take the private property of the citizen for that purpose.

TRESPASS. The opinion states the facts.

Hammond and Mynatt, for the plaintiff in error.

Hill and Candler, for the defendants in error.

By Court, WALKER, C. J. This is an action of trespass, brought by the plaintiff in the court below, against the defendants, for breaking and entering upon his premises, in the county of Fulton, known as the Davis place, and taking possession of the same, including the dwelling-house and other houses situated thereon, and expelling him therefrom for the space of eight months, and for other wrongs and injuries done to him by the defendants.

The right of enjoyment of private property in this state being an absolute right of every citizen, every act of another which unlawfully interferes with such enjoyment is a cause of action. The bare possession of lands authorizes the possessor to recover damages from any person who wrongfully in any manner interferes with such possession. The person having title to lands, if no one is in possession under the same title with him, may maintain an action for trespass thereon. Where two persons claim to have actual possession of the

same land, he is deemed in possession who has the legal title, and the other is a trespasser. The owner of realty, having title downwards and upwards indefinitely, an unlawful interference with his rights, below or above the surface, alike gives him a right of action: Rev. Code, secs. 2962, 2965, 2966, 2969. The entering the dwelling-house of another without license is a trespass in the eye of the law. And if one enter the dwelling-house of another by permission, and continue there after he has been requested to leave it, he becomes a trespasser *ab initio*: *Adams v. Freeman*, 12 Johns. 408 [7 Am. Dec. 327]. This action may be maintained, not only against the party who did the act, but against all who direct or assist in the commission of it: 2 Leigh N. P. 1443. Thus a party may be sued in trespass in respect of his previous consent or request that the trespass may be done, as if A command or request B to beat or impress C, or to take his goods, or to commit a trespass on his land, and B do it, this action lies as well against A as against B: 1 Chit. Pl. 181; 7 Com. Dig. 515 c. There are no accessories in trespass, but all are principals: *Id*.

The defendants in this case, however, seek to justify themselves for the alleged trespass on the plaintiff's property, on the ground that they were acting as the justices of the inferior court of Fulton County, and in their official capacity seized and took possession of the same for the purpose of establishing a small-pox hospital; and upon the trial of the case in the court below, the court charged the jury, amongst other matters connected with the trial, "that if you shall believe from the evidence that the defendants, as justices of the inferior court of Fulton County, did take possession of the plaintiff's property, and if you shall further believe from the evidence that the necessity was such that the public good required the seizure of the plaintiff's property at that time to prevent the spread of this contagion, then the defendants are not liable." This charge of the court is excepted to and assigned as error. By the act of 1862, the provisions of which are incorporated in the revised code, the justices of the inferior courts of each county in the state, within which the small-pox has appeared or may appear, are authorized and empowered to provide a suitable hospital for those so afflicted, and also to provide proper quarantine regulations to prevent the spread of the disease: Rev. Code, secs. 1411, 1412. The property of the plaintiff is alleged to have been seized on the ninth day of January, 1863, prior to the adoption of our pres-

ent state constitution; but the constitution of the United States declares, "nor shall private property be taken for public use without just compensation." This great fundamental principle embodied in the constitution of the United States for the protection of the private property of the citizen was recognized to be of binding force in the courts of this state in *Young v. Harrison*, 3 Ga. 31. It is to be noted that the act of the legislature authorizing the inferior courts to provide suitable hospitals for small-pox patients makes no provision for compensation, from which we infer that it was not contemplated that private property should be taken or impressed for that purpose. The right of the inferior court to provide hospitals for small-pox patients, under the law, is one thing; but their right to seize or impress the private property of the citizen for that purpose is another and quite a different thing. No express power is given them in the law to do so, and we cannot give it to them by implication.

The main question involved in this case has already been decided by this court on an application for injunction between these same parties: *Markham v. Howell*, 33 Ga. 508. In that case this court said: "That the defendants were authorized to establish a hospital did not confer the right to impress. This is a too dangerous and extraordinary power to be conferred by mere implication; it must be expressly granted, and must provide in the grant the mode of compensation." The power to seize the plaintiff's property in this case is attempted to be derived from section 2200 of the revised code. That section of the code only extends to the taking possession of a house or surrounding it with a guard in which contagious disease exists, to prevent its spreading,—a mere quarantine regulation.

It has been insisted here that the defendants acted in their official capacity in good faith, in seizing the plaintiff's property for hospital purposes, under a pressing necessity to prevent the spreading of a loathesome disease, and that it will operate harshly to make them liable as trespassers in their individual capacity. We feel the full force of the argument; but the reply is, that the plaintiff claims before this court to have his constitutional rights protected, that his rights of private property have been invaded without lawful authority by the defendants, and demands redress therefor at our hands, and so believing, we are bound to give it to him so far as to adjudge the law in his favor. It is our judgment, that under

the law the justices of the inferior court of Fulton County had the power and authority to provide a suitable hospital for small-pox patients; but they did not have the power and authority, under the law and constitution, to seize or impress the plaintiff's private property for that purpose, as set forth in this record, and that the court below erred in its charge to the jury upon this branch of the case.

Let the judgment of the court below be reversed.

POWER OF MUNICIPALITIES AND OTHER PUBLIC BODIES, IN CASE OF CONTAGION, TO ESTABLISH PEST-HOUSES AND ENFORCE QUARANTINE REGULATIONS, AND TO COMPEL THOSE SICK WITH CONTAGIOUS DISEASES TO REMOVE TO PEST-HOUSES OR TO ISOLATE THEMSELVES.—The preservation of the public health is everywhere regarded as an important function of government. Among modern nations, quarantine has been established and recognized by international law for the common protection of states against those diseases which are believed to be capable of being carried from one country into another: Baker on Laws Relating to Quarantine, 1. Quarantine, which was so called because the period of detention was in early times forty days, is said to have been established by the Venetians as early as the year 1484, to prevent the introduction of the plague into their city. But it was not until the plague of Marseilles, in 1720, that quarantine regulations became thoroughly understood: *Id.* 3.

Each state has, in the exercise of its police power, an undoubted right to adopt such means as to its law-making power shall seem adapted to the end, to secure security and protection to its citizens from the ravages of contagious or infectious diseases. Tiedeman, in his recent work, discussing this subject, says: "The right of the state, through its proper officer, to place in confinement, and to subject to regular medical treatment, those who are suffering from some contagious or infectious disease, on account of the danger to which the public would be exposed if they were permitted to go at large, is so free from doubt that it has been rarely questioned. The danger to the public health is a sufficient ground for the exercise of police power in restraint of the liberty of such persons. This right is not only recognized in cases where the patient would otherwise suffer from neglect, but also where he would have the proper attention at the hands of his relatives. While humanitarian impulses would prompt such interference for the benefit of the homeless, the power to confine and to subject by force to medical treatment those who are afflicted with a contagious or infectious disease, rests upon the danger to the public, and it can be exercised, even to the extent of transporting to a common hospital, or *lazzaretto*, those who are properly cared for by friends and relatives, if the public safety should require it": Tiedeman on Limitations of Police Power, sec. 42.

And whatever powers of this nature the legislature of a state possesses, it may confer upon municipal corporations or other suitable public bodies for the purpose of preserving the health and safety of the inhabitants of the city or district over which they have control or jurisdiction: 1 Dillon on Mun. Corp., 3d ed., secs. 144, 369, 370; *Dubois v. City Council of Augusta*, Dudley (Ga.), 30; *City of Clinton v. County of Clinton*, 61 Iowa, 205; *Staples v. Plymouth County*, 62 *Id.* 364; *Harrison v. Mayor etc. of Baltimore*, 1 Gill, 264;

People v. Supervisors of McComb County, 3 Mich. 475; *Rae v. Mayor etc. of Flint*, 51 Id. 526; *Metcalf v. City of St. Louis*, 11 Mo. 102; *City of St. Louis v. McCoy*, 18 Id. 238; *City of St. Louis v. Boffinger*, 19 Id. 13; *Wilkinson v. Albany*, 28 N. H. 9; *Commissioners of Salisbury v. Powe*, 6 Jones, 134; *Aaron v. Broiles*, 64 Tex. 316; S. C., 53 Am. Rep. 764; *Harzen v. Strong*, 2 Vt. 427. In *Dubois v. City Council of Augusta*, Dudley (Ga.), 30, it was held that a city ordinance prohibiting persons coming in vessels from infected places to come direct to the wharf, and requiring them to remain at a certain point until they should be examined by a hospital physician, was not repugnant either to the constitution or to the general law of the state. It was further held that authority by charter to pass ordinances respecting harbors and wharves, and "every other by-law necessary for the security, welfare, and convenience of the city," gave to the city council power to pass ordinances requiring boats coming from infected places to anchor before landing, and to submit to an examination, and that such ordinance was not repugnant to a general law of the state prohibiting any person from coming into the state from an infected place, in violation of quarantine regulations. In *Harrison v. Mayor etc. of Baltimore*, 1 Gill, 264, it was held that the mayor and common council of Baltimore, by their charter, had full power to pass all laws necessary to preserve the health of the city, and to prevent the introduction of contagious diseases within the city, and within three miles of it. And it was said that they possessed all the power which the general assembly could have exerted, that they were the exclusive judges of the degree of necessity, and that the means and manner contributing to the end in view were committed to their sound discretion. In *Rae v. Mayor etc. of Flint*, 51 Mich. 526, it was said that the power of a city council in such matters is a police power, and is commensurate with their duty. In *Metcalf v. City of St. Louis*, 11 Mo. 102, it was decided that an act of the legislature authorizing the city of St. Louis to make quarantine regulations was not a delegation of legislative power, and that ordinances passed under such authority were not repugnant either to the constitution of the United States or to the constitution of Missouri. In *City of St. Louis v. McCoy*, 18 Mo. 238, and in *City of St. Louis v. Boffinger*, 19 Id. 13, it was held that an ordinance of the city of St. Louis requiring boats carrying more than a certain number of passengers to remain in quarantine not less than forty-eight hours nor more than twenty days, was not repugnant to the clause of the constitution of the United States reserving to Congress the exclusive right to regulate commerce. And in *Aaron v. Broiles*, 64 Tex. 316, S. C., 53 Am. Rep. 764, Delany, J., who delivered the opinion of the court, in referring to an ordinance providing for the removal from the city of persons infected with small-pox, said: "The right of the city council of Fort Worth, acting under legislative authority, to enact and to enforce the ordinance which was introduced in evidence, is not to be questioned." What has been said in the foregoing cases in reference to city councils applies equally to boards of health or other public bodies authorized by the legislature to act in these matters. Said Beck, J., in delivering the opinion of the court in *Staples v. Plymouth County*, 62 Iowa, 364, 366: "This statute requires and authorizes the board of health to 'make effectual provision, in the manner in which they shall judge best, for the safety of the inhabitants, by removing such sick and infected person to a separate house.' The law contemplates the isolation of infected persons, and directs that 'effectual provision' therefor shall be made by the board of health. This is demanded by humanity, and has long been known to be the effectual method

of arresting the spread of contagion. Public policy demands that the spirit of the statute shall be regarded and enforced. The board of health is authorized to do whatever is necessary in order to make 'effectual provisions' for the isolation of infected persons. In order to isolate the patient, he may be removed to a separate house. If no suitable house may be had, or if a temporary pest-house or hospital may be erected at less cost than the rent of such house, the board of health, in the exercise of wise discretion, may provide such temporary building. This they would be authorized to do in the exercise of these general powers under the section, for it is incidental thereto. They could not otherwise make 'effectual provision for the safety of the inhabitants.'"

But while the power to establish pest-houses, to enforce quarantine regulations, and to compel persons infected with contagious diseases to remove to pest-houses or hospitals, and to isolate themselves from other persons, is undoubted, it must nevertheless be exercised in such a manner as to cause as little hardship to the unfortunate class of persons upon whom it is exercised as the exigencies of the occasion and a proper regard for the public welfare will permit. The detention of persons in a *lazaretto*, or pest-house, is virtually imprisonment, without the commission of any offense by the party so detained. It ought, therefore, to be as brief and as light as possible, consistent with the safety of the public whose good it is designed to promote. If city authorities cause the removal of persons afflicted with small-pox or other contagious diseases, and in doing so fail to exercise the care and caution which the circumstances of the case demand, and the death of the patients results from their negligence, they will be responsible in damages, even though they acted under a city ordinance: *Aaron v. Broiles*, 64 Tex. 316; S. C., 53 Am. Rep. 764. It is the duty of a city and of those to whom it intrusts the business of removing unfortunate persons afflicted with contagious diseases to make every reasonable provision for their safety: *Id.* In that case it was held that there is nothing judicial in the act of removing diseased persons from a city, and that the question in the case was, whether there was a wrong done in the manner of the removal.

The right to impress property to be used in taking care of persons infected with contagious diseases can only be exercised when expressly granted: *Pinkham v. Dorothy*, 55 Me. 135. In that case it was decided that the Maine statute did not authorize the impressment of a stage-coach for the removal of such persons. It was held in *Harrison v. Mayor etc. of Baltimore*, 1 Gill, 264, that the corporation could cause a vessel and all persons on board of her to be taken possession of and controlled until their disinfection was complete, and impose upon the captain, owner, or consignee the expenses incurred in disinfecting. But under the statutes of Maine and of Massachusetts it is held that health-officers are not authorized to take vessels in quarantine or buildings in which persons sick with contagious diseases are being cared for into their own possession and control, to the exclusion of the owners: *Mitchell v. City of Rockland*, 41 Me. 363; S. C., 45 Id. 496; S. C., 52 Id. 118; *Lynde v. City of Rockland*, 66 Id. 309; *Brown v. Murdock*, 140 Mass. 314. In the case last cited, Devens, J., delivering the opinion, said: "But the mere fact that small-pox existed on the plaintiff's premises did not authorize the defendant thus to control them in the absence of any contract with or authority from the owner. While, when such a disease exists in a town, the board of health are to use all possible care in preventing the spread of infection, and to give public notice 'by displaying red flags,' and 'by all other means which

in their judgment shall be most effectual for the common safety,' this care is to be exercised in the mode prescribed by law, and with that regard to the rights of others, in their persons and property, which is shown by other sections of the statute to be required. By the general authority to take such measures as are deemed necessary for the safety of the inhabitants, it is not intended to confer unlimited authority on the board to control persons and property at its discretion." But in Massachusetts, if the patient is too sick to be removed, the place where he is may be considered as a hospital, and the persons in it may be subjected to very stringent regulations, to prevent the spread of the disease: *Brown v. Murdock, supra*. In Maine and in Massachusetts it is provided by statute that clothing and other property infected by contagious diseases may be destroyed upon the order of two justices of the peace, and it is provided that just compensation shall be made for the property destroyed, to the owners thereof. But no property can be destroyed except by such formal proceeding as the statute provides: *Brown v. Murdock, supra*.

Under the Massachusetts statute, the board of health of a town has no authority to take possession of a dwelling-house and the furniture therein, without the consent of the owner and occupant and to his exclusion, and use the house as a hospital for a person found therein who is infected with a contagious disease, and is too sick to be removed without danger to his health: *Spring v. Inhabitants of Hyde Park*, 137 Mass. 554; S. C., 50 Am. Rep. 334; *Brown v. Murdock*, 140 Mass. 314. Nor will the mere fact that the small-pox exists on a party's premises authorize a member of the board of health to station such persons as he may deem necessary on or near the premises to guard against ingress or egress, for the purpose of preventing the spread of the disease: *Brown v. Murdock, supra*.

It is held that the authority conferred by law upon counties, towns, and cities, and the authorities thereof, to provide against the spread of contagious diseases extends to the making of contracts for the nursing and care of the patients, and for providing all things necessary for their comfort and safety; and the courts have been liberal in upholding the authority of the officers to make such necessary expenditures, and in maintaining the liability of municipal corporations for the payment of such expenses: *City of Clinton v. County of Clinton*, 61 Iowa, 205; *Staples v. Plymouth Co.*, 62 Id. 364; *Inhabitants of Kennebunk v. Inhabitants of Alfred*, 19 Me. 221; *People v. Supervisors of Macomb Co.*, 3 Mich. 475; *Rae v. Mayor etc. of Flint*, 51 Id. 526; *Elliott v. Kalkaska Supervisors*, 58 Id. 452; S. C., 55 Am. Rep. 706; *Wilkinson v. Albany*, 28 N. H. 9; *Town of Farmington v. Jones*, 36 Id. 271; *Labrie v. Manchester*, 59 Id. 120; S. C., 47 Am. Rep. 179; *Harzen v. Strong*, 2 Vt. 427. Campbell, J., in delivering the opinion of the court in *Elliott v. Kalkaska Supervisors, supra*, said: "It is very much to be regretted that respondents have been so ill advised as to attempt to avoid the payment of these claims. The statutes designed to protect the community from infection are of the utmost importance, and persons cannot be compelled to risk their lives to take charge of patients unless they choose to do so. Suitable and competent persons cannot be procured without fair remuneration. It would be dangerous in the extreme if such matters could be left open to the caprice of any public body after the immediate danger is ended, where notions of thrift may interfere with those of humanity. The law has not left these matters open to any such risk, and it is the duty of courts to see that it is not disregarded." Where, under the Iowa statute, the local board of health adopts the plan of providing for an in-

fecting person in the family where he happens to be, and isolates the family for the protection of the inhabitants, the county is liable to the city not only for food furnished the infected person, but also for that furnished to the isolated family. And where for the protection of the inhabitants the board of health causes the clothes worn by members of the isolated family to be burned and furnishes them new clothes instead, the expenses of such new clothing is properly chargeable to the county. The county is also liable for reasonable compensation paid to a physician for attendance upon the infected person: *City of Clinton v. County of Clinton*, 61 Iowa, 205. In *Commissioners of Salisbury v. Powe*, 6 Jones, 134, it was held that a town may pass an ordinance forbidding a person from entering the town who came from a place where a contagious disease existed.

CASES
IN THE
SUPREME COURT
OF
ILLINOIS.

ILLINOIS CENTRAL RAILROAD COMPANY v. SUTTON.

[42 ILLINOIS, 433.]

PASSENGER ON RAILROAD TRAIN CAN ONLY BE EXPELLED AT REGULAR STATION for violating a rule of the company requiring passengers to purchase tickets before entering the train. The willful neglect to comply with that rule and the refusal to pay the fare are substantially the same offense against the rights of the road, and the penalty for the one is no greater than that for the other.

RAILROAD COMPANY IS LIABLE FOR EXPELLING PASSENGER AT PLACE OTHER THAN REGULAR STATION, where the passenger, on being informed just before the train started of the rule of the company requiring tickets to be purchased before entering the cars, seeks to buy a ticket, but finds the office closed, and afterwards offers to pay his fare to the conductor, who refuses to receive it.

DECLARATIONS OF PERSON INJURED AS TO CAUSE OF HIS INJURY, made to his physician, are inadmissible in evidence. The physician cannot give in evidence the mere statement of the party injured in lieu of his own professional opinion.

PHYSICIAN ASKED TO GIVE HIS OPINION AS TO CAUSE OF PATIENT'S CONDITION at a particular time must necessarily be guided to some extent in forming his opinion by what the sick person may have told him in detailing his pains and sufferings, and his opinion founded in part upon such *data* may be received in evidence; and he may even state what his patient said in describing his bodily condition, if it is said under such circumstances as free it from all suspicion of being spoken with reference to future litigation and give it the character of *res gestæ*.

TRESPASS on the case. The facts are stated in the opinion.

W. D. Somers, for the appellant.

E. S. Terry, for the appellee.

B Court, LAWRENCE, J. This case, in its essential features, is like that of *Chicago etc. R. R. Co. v. Flagg*, 43 Ill. 364 [post, p. 133], decided at the present term. We held in that case, when a railway company carries passengers in a car attached to a freight train, and adopts a regulation requiring tickets to be purchased before entering the train, and a passenger disregards the rule, he can only be expelled from the train at a regular station. It is urged that this provision of the statute, forbidding passengers to be elsewhere expelled, applies only to the case of refusal to pay the fare, and not to a violation of any other reasonable rule. But the willful neglect to buy a ticket at the time and place required by the rules, and the refusal to pay the fare, are substantially the same offense against the rights of the road, and the former can be visited by no heavier penalty than the latter. But in this case, as in the other above referred to, there was no satisfactory proof that the plaintiff was cognizant of the rule, and he offered to pay his fare to the conductor, who refused to receive it, and compelled him to leave the train at some distance from a station. He was, indeed, informed of the rule just before the train started, and then sought to buy a ticket, but the office was closed. Under these circumstances, he was clearly entitled to his action.

He claims to have been suffering from disease, and that it was aggravated by the walk incident to his expulsion from the cars. To prove this, a physician was examined, who testified he visited the plaintiff and found him suffering much pain; that he had been attending him for two years, and had cautioned him against severe exercise, and that the plaintiff informed him his present condition was caused by over-exertion in walking. The defendant moved the court to exclude so much of this evidence as related to what the plaintiff said of the cause of his condition. This the court refused to do, and in this decision there is error. A physician, when asked to give his opinion as to the cause of a patient's condition at a particular time, must necessarily, in forming his opinion, be to some extent guided by what the sick person may have told him in detailing his pains and sufferings. This is unavoidable, and not only the opinion of the expert, founded in part upon such *data*, is receivable in evidence, but he may state what his patient said, in describing his bodily condition, if said under circumstances which free it from all suspicion of being spoken with reference to future litigation, and give it the char-

acter of *res gestæ*. But to permit a party to prove what he himself stated to his physician, not in regard to the character and manifestations of his malady, but in reference to its specific cause, when that is one of the issues before the jury, would be carrying an acknowledged departure from the ordinary rules of evidence, having its origin in necessity, to a most dangerous extent: *State v. Davidson*, 30 Vt. 377 [73 Am. Dec. 312].

The propriety of enforcing this rule in the present case is manifest from a careful consideration of the evidence. The physician was asked as to his professional opinion of the cause of the plaintiff's illness. This opinion he gives nowhere in his testimony, but, instead thereof, he states that the plaintiff said his sickness was caused by over-exercise in walking. True, the physician says he had cautioned the plaintiff against over-exercise in walking, and that walking would injure him, but he does not give his professional opinion that the illness, which confined the plaintiff for several weeks, was due specifically to that cause, although that impression is allowed to be made upon the minds of the jury. It seems to us not impossible the physician may have been unwilling to state, as his own belief, that the plaintiff's long confinement was due to the walk taken by him after having been expelled from the railway train. That expulsion occurred only between one and two miles from the station. It appears in the testimony that plaintiff "was walking about the premises" while waiting for the train at the station. He was engaged in the tin and hardware business, and two of his witnesses swear his time was worth fifty dollars per day. If that was true, he must have been leading a life of great activity. We can well see, therefore, that the physician may have been in doubt as to whether the walk of that day caused his illness, and whether in doubt or not, he should not have been permitted, against the objection of the defendant, to give to the jury the statement of the plaintiff in lieu of his own professional opinion. It is urged by counsel for appellee that the fact of his having been obliged to walk from one to two miles is proved by other witnesses. That is true, but the question was, whether his illness was attributable to that walk, and on that point the only direct evidence in the record was the statement of the plaintiff himself. Perhaps the jury would have presumed this from the fact that the illness immediately followed the walk, and from the statement of the physician that the plaintiff had for a long time been suffering from a disease which would be aggravated by severe exercise. But

we cannot tell how far the jury may have been influenced in fixing the damages by this statement of the plaintiff, given to them through the physician, and as it was illegal evidence, we must reverse the judgment, and remand the cause for another trial.

Judgment reversed.

EXPULSION OF PASSENGERS FROM RAILROAD TRAIN: See *Johson v. Concord R. R. Corp.*, 88 Am. Dec. 199, note 207, where other cases are collected; *Pennsylvania R. R. Co. v. Vandiver*, 82 Id. 520, note 525; *Chicago, B., & Q. R. R. Co. v. Parks*, 68 Id. 562, note 570, where this subject is discussed at length. It is a wrongful act in violation of the statute, for which a railroad company is liable, to put a passenger off a car elsewhere than at a regular station: *Toledo, P., & W. R. R. Co. v. Patterson*, 63 Ill. 307, citing the principal case.

PLAINTIFF'S NARRATIVE DECLARATIONS MADE TO HIS PHYSICIAN are not admissible in evidence when: See *Emerson v. Lowell Gas Light Co.*, 83 Am. Dec. 621, note 623. The statements of a patient to his physician of his pain and suffering, and in regard to his bodily condition, are competent to enable him to form an opinion as to the extent and nature of his injuries; but it is not competent for the physician to testify to the plaintiff's statements as to the specific cause of the injury, that being one of the issues before the jury: *Rossa v. Boston Loan Co.*, 132 Mass. 440, citing the principal case.

JARRARD v. HARPER.

[63 ILLINOIS, 457.]

INSTRUCTION, "IF YOU BELIEVE FROM THE EVIDENCE THAT THE PROPERTY IN QUESTION WAS PLAINTIFF'S, you must find the defendant guilty," given to the jury in an action of replevin, is technically erroneous in not embracing proof of a demand; but where the record shows clear proof of demand before suit, and the evidence sustains the verdict, the appellate court will not reverse the judgment.

VERDICT IN REPLEVIN, "WE, THE JURY, FIND THE DEFENDANT GUILTY," is not precisely right; but the finding is equivalent to a finding of property in the plaintiff in a case where the proceedings were *ore tenus*.

REPLEVIN. The opinion states the case.

S. P. Moore, for the plaintiff in error.

A. W. Metcalf, for the defendant in error.

By Court, BREESE, J. This was an action of replevin, commenced before a justice of the peace of Bond County, brought by James R. Harper against Abraham Jarrard, and taken by appeal to the county court, where a verdict and judgment were rendered for Harper, to reverse which the case is brought here by writ of error.

The whole subject of controversy is of trifling amount.

The only question in the case is as to the propriety of the instruction given by the court. It was this: "The court instructs the jury that if they believe from the evidence that the hog in question is plaintiff's hog, they will find the defendant guilty."

It is contended by the plaintiff in error that proof of a demand should have been embraced in the instruction as a necessary element to justify a verdict for the plaintiff, and in this he is no doubt technically correct; but as there was clear proof of a demand before suit brought, and the evidence sustains the verdict, we cannot reverse the judgment. The form of the verdict is not precisely right, but the proceedings were *ore tenus*, and the finding was equivalent to a finding of property in the plaintiff. The judgment is affirmed.

Judgment affirmed.

DEMAND IN REPLEVIN, WHEN NECESSARY AND WHEN NOT: See *Trade v. Anderson*, 81 Am. Dec. 795, note 801.

VERDICT IN DETINUE, WHEN SUBSTANTIALLY CORRECT: See *Rambo v. Wyatt's Adm'r*, 70 Am. Dec. 544.

COURTS ENDEAVOR TO GIVE EFFECT TO INFORMAL VERDICTS: See *Conner v. Winton*, 65 Am. Dec. 761, note 764; *Wood v. McGuire's Children*, 63 Id. 246, note 248, where other cases are collected. It is immaterial what the form of the verdict may be, so that it has the substance of a proper finding: *Wiggins v. City of Chicago*, 68 Ill. 376, citing the principal case.

ILLINOIS CENTRAL RAILROAD COMPANY v. ADAMS.

[42 ILLINOIS, 474.]

COMMON CARRIER CANNOT STIPULATE AGAINST HIS OWN GROSS NEGLIGENCE, or that of his employees, or against willful default on his or their part. And it is such gross negligence as a railroad company cannot stipulate against for one of its conductors to refuse to apply water to hogs that are being transported in its cars, after being requested so to do by the owner of the hogs, where water for that purpose was convenient and abundant, and several of the hogs died by reason of such refusal.

IT IS EXCLUSIVE PROVINCE OF JURY TO WEIGH TESTIMONY of witnesses, and give credence to those to whom it properly belongs, in cases where the evidence is conflicting, and the court will not interfere with their decision under such circumstances.

ACTION on the case. The facts appear from the opinion.

C. H. Moore, for the appellants.

H. S. Green and L. Weldon, for the appellee.

By Court, BRESEE, J. This was an action on the case, brought in the De Witt circuit court by Parker S. Adams against the Illinois Central Railroad Company, for negligence in transporting certain car-loads of live hogs from Clinton to Chicago, by reason whereof a number of the hogs died.

The cause was tried by a jury, and a verdict for the plaintiff for \$505.12. A motion for a new trial was made and overruled, and exception taken. Exceptions were also taken to the judgment of the court refusing certain instructions asked by the defendant, in modifying others, and in giving instructions in behalf of the plaintiff. The case is brought here by appeal.

The declaration as filed contained four counts; to the first three a demurrer was sustained, and the trial was had upon the fourth count, in which the averment was, that the defendants were guilty of gross carelessness in not watering the hogs, by means whereof they were injured to the amount of one thousand dollars.

Various errors are assigned, but the controversy depends principally on the instructions and the nature of the contract entered into by the parties.

It is insisted by the appellants that by the contract of shipping the company was not liable for any loss except such as might result from a collision of the train, or when the cars were thrown from the track in course of transportation, and that the hogs were to be fed and watered by the owner, and to be at his risk in all respects except as specified in the form of the contract or receipt in the hands of the agent.

The phrase, "feeding and watering," as used in the contract, has reference alone, as we understand the contract, to the ordinary sustenance such animals require in the course of transportation; while the negligence complained of, and for which the railroad company is sought to be charged, is the application of water externally to hogs confined in cars, causing them to become much heated, and from which speedy death ensues if they are not promptly relieved by this application.

The whole case turns upon the fact of the liability of the company to apply this water; and failing to do so on request, does it amount to such gross negligence against which it is not in the power of the company to stipulate?

The proof is clear that it is the custom of the railroad agents to make this application of water, and it is most rea-

sonable and just that it should be their duty, for their employers own the trains, the tanks, and the water within them, and have entire and exclusive control of all the movements and stoppages of the trains, with which no shipper can in the slightest degree interfere. Were it not so, who can estimate the derangement to which trains would be subjected, did every shipper control its movements,—did he have the power to stop it for any purpose or appropriate water at an inconvenient or improper station when there might be but a scanty supply not in excess of the necessities of the boilers? Good policy and a due regard to the operations of the trains require that this duty of watering live hogs in the manner described in the evidence should devolve upon those who manage the trains, and not upon the shippers of such stock. The contract referred to in the declaration had no reference to this matter, but to their ordinary feeding and watering, which duty properly belonged to the owner.

If, then, it was gross negligence in the conductor of the train carrying these hogs, in refusing to apply water to them when requested at Bloomington or at Normal, at which latter place water was convenient and abundant, the company could not contract against that. This court said in the case of *Illinois Central R. R. Co. v. Crabtree*, 19 Ill. 139, that although a railroad company might protect itself by contract against certain risks assumed by common carriers and belonging to their vocation, it was contrary to good morals and public policy that they should be allowed to stipulate against their own gross negligence, or that of their employees, or their willful default.

The jury have found there was gross negligence in this case. It is true, the testimony was contradictory on this point, but the jury have given the most credit to Shaw, the witness for plaintiff, who testified to his own interference with Perigo, the conductor, when the train was at rest at Bloomington, and also when it was on the switch at Normal, and at both places distinctly informed the conductor of the suffering condition of the hogs for the want of water, and of the personal appeal of the owner to the same conductor to apply the water. Perigo, the conductor, denied all this, and it was exclusively for the jury to weigh the testimony of both, and give the credit where they thought it most properly belonged, and with their decision in this regard this court is not permitted to interfere. The testimony of Shaw fully establishes gross negligence of a

willful character, and inexcusable in any light in which it can be regarded. If excusable at Bloomington, on account of a scarcity of water or a total want of a supply there, it was not so at Normal, where the train rested long enough to have performed the operation more than once if needed. But the appellant's counsel insists that it was the gross neglect of appellee in not watering the hogs at Clinton, after driving them more than four miles, and suffering them to remain in the stock-yard there without water from ten o'clock in the forenoon until four or five o'clock in the afternoon, when they were placed on the cars.

Most of the witnesses say it would have been a good thing to have watered the hogs at Clinton, but no one attributes the deaths and injuries to this omission, nor does there seem to have been any necessity for watering them there before placing them on the cars. It was not water internally the animals needed; and as it was a wet time at which they were driven to Clinton, and several branches of water crossed on the route thither, it is reasonable to suppose they had their fill of that element, and it was only when confined in the cars that they suffered for the want of it; and the conductor was deaf to every appeal made to him to supply water until the train had reached El Paso, a distance of more than forty miles from Clinton, and then denied water until the station agent at that place directed the conductor to do his duty by supplying water. At this point, the hogs were transferred to the cars going to Chicago, and Perigo's train proceeded on the main track. The counsel for appellant insists it was not the duty of this train to engage in switching or anything else, but to coal and water, and hitch on such cars as were to go north by his train.

This being so, then, most imperative and overwhelming was the duty of this conductor to apply the water at Normal when he was requested by the owner to do it, and the animals then in a suffering and dying condition. He knew he could not take the time at El Paso. He knew he had other duties there which would engage his train, and when he arrived there it was only by the interference of the station agent he made any movement in the direction desired. If the jury believed the statement of Shaw, a case of recklessness, of gross negligence, by Conductor Perigo was fully established.

The views here presented fully dispose of all the objections taken to the instructions.

Those which were refused, as asked by appellant, were substantially embraced in those given.

Perceiving no error in the record, the judgment must be affirmed.

Judgment affirmed.

POWER OF COMMON CARRIER TO LIMIT HIS COMMON-LAW LIABILITY BY SPECIAL CONTRACT: See note to *Southern Express Co. v. Purcell*, ante, p. 53, where other cases are collected. Railroads may by contract exempt themselves from liability on account of the negligence of their servants other than that which is gross or willful: *Arnold v. Illinois C. R. R. Co.*, 83 Ill. 280, citing the principal case. The principal case is also cited in *Ohio & M. R'y Co. v. Selby*, 47 Ind. 471, and in *Railroad Co. v. Lockwood*, 17 Wall. 367, as holding that a railroad company may exempt itself by special contract from liability for loss occasioned by its ordinary negligence; but this doctrine was disapproved in both of those cases.

NOT TO APPLY WATER TO HOGS WHEN HEATED and in danger of dying from want of such application is gross negligence on the part of a railroad company engaged in transporting them: *Toledo, W., & W. R'y Co. v. Thompson*, 71 Ill. 439; *Toledo, W., & W. R'y Co. v. Hamilton*, 76 Id. 394, both citing the principal case.

GRAHAM v. ANDERSON,

[42 ILLINOIS, 514.]

OBJECTION THAT NAME OF COUNTY IS OMITTED IN CAPTION TO ACKNOWLEDGMENT OF DEED is obviated by proof that the justice of the peace who took the acknowledgment was a justice of the peace of the county where it was taken, and that he took it as such justice.

COURT TAKES JUDICIAL NOTICE OF WHO ARE JUSTICES OF PEACE of the county in which it is sitting.

OBJECTION CANNOT BE MADE FOR FIRST TIME IN APPELLATE COURT that there is no proof that the indebtedness named in a deed of trust was unpaid at the time of the sale under the deed, in an action of ejectment in which the plaintiff deduces title through such sale. Such objection should be made in the court below, so as to give to the adverse party an opportunity to obviate it when the deed was introduced in evidence.

WHERE TRUST DEED RECITES INDEBTEDNESS, PRESUMPTION IS THAT SUCH INDEBTEDNESS REMAINS unpaid, which presumption is only to be rebutted by affirmative proof of its payment.

WHERE VERDICT DEPENDS UPON CREDIBILITY OF WITNESSES, it is the peculiar province of the jury to judge of that credibility, and to attach such weight to the testimony of each as may seem to be proper, after a due consideration of all the circumstances in the particular case.

PAROL EVIDENCE IS NOT ADMISSIBLE IN ACTION OF EJECTMENT TO IMPEACH CERTIFICATE of acknowledgment to a deed, in the absence of fraud or imposition.

EJECTMENT. The opinion states the case.

J. S. Bailey, for the appellant.

Palmer and Hay, for the appellees.

By Court, BREESE, J. This was an action of ejectment, brought in the Schuyler circuit court, to the May term, 1863, by Edgar Anderson and others, heirs at law of James L. Anderson, deceased, against David J. Graham, to recover the possession of a certain tract of land in that county, in and to which defendant claimed a homestead right.

The plaintiffs deduced title through their father, James L. Anderson, who purchased the same at a sale under a trust deed made by Graham and wife to John C. Bagby, to secure certain judgments against Graham.

The controversy arises upon the execution and acknowledgment of this deed, it being contended by Graham that the premises were the homestead of himself and family, and that his wife had not released her right to it as a homestead. This trust deed was executed on the 24th of March, 1860, and the certificate of acknowledgment of the justice of the peace purports to release homestead and dower in the usual form, as the statute requires.

The first objection taken to the acknowledgment is, that a venue is wanting, the county being omitted in the caption thereof.

This objection was obviated, if a valid one, by proof that the justice of the peace who took the acknowledgment was a justice of the peace of Schuyler County at the time, and that he took it as such justice.

But the objection was not valid, as this court, in the case of *Irving v. Brownell*, 11 Ill. 402, where the same point was made, held that, without this proof, the certificate was sufficient, as the court, when sitting in Pike County, would officially take notice who were the justices of the county without any proof thereof, citing the case of *Shattuck v. People*, 4 Scam. 431. In that case the court said, the circuit court as a matter of convenience, takes cognizance of the fact who are justices of the peace for the county in which it is held, and proof of the official character of these officers is never required, unless that particular question is directly in issue. See also *Livingston v. Kettelle*, 1 Gilm. 116 [41 Am. Dec. 166].

Another objection was made, that there was no proof that the indebtedness specified in the deed of trust was unpaid at the date of the sale.

This objection was not made in the circuit court, where it might have been obviated when the deed was introduced as evidence. It is too late now to make it: *Selby v. Hutchinson*, 4 Gilm. 319; *Norton v. Dow*, 5 Id. 459; *Morris v. Trustees*, 15 Ill. 266; *Harmon v. Thornton*, 2 Scam. 351; *President and Trustees v. Holland*, 19 Ill. 271; *Gillespie v. Smith*, 29 Id. 473; *Sargeant v. Kellogg*, 5 Gilm. 273; *Swift v. Whitney*, 20 Ill. 144; *Duntain v. Bailey*, 27 Id. 409.

Had this objection been made in the circuit court, it could not have availed, as by the trust deed the legal estate was vested in the trustee, and he had conveyed it to the plaintiff's ancestor,—whether rightfully or wrongfully was not a subject of inquiry in the ejectment. If the trustee sold contrary to the conditions of the deed, the remedy was in equity: *Reese v. Allen*, 5 Gilm. 236.

The trust deed recited the indebtedness by judgment, and the presumption would be that the indebtedness was unpaid, only to be rebutted by affirmative proof of its payment before the sale.

The remaining point is important. The defendant claims that at the time of the execution of the trust deed to Bagby the premises conveyed by it were the homestead of the grantors, and the wife did not release her homestead right.

The proof that it was the homestead at the time the deed was executed is not very clear.

Adam Sapp, a witness for the defendant, testified that the defendant was a married man, having a wife and children living with him upon the land described in the declaration. This witness speaks of the time then, which was the time of the trial; he does not say the defendant with his family was living on the land at the time of the execution of the deed.

Another witness for the defendant, his daughter, Mrs. Isabel J. Burnham, in answer to the interrogatory, "State if you know what land the deed was about," said, "It was about the homestead land and farm."

This witness was present at the time the deed was executed, and then a member of the family, and the deed acknowledged at the defendant's house; and the inference is reasonable that it was the homestead where the family was then living that was conveyed by the deed.

The question then is, Did the wife release her homestead right in the premises? The magistrate taking the acknowledgment certifies in due form of law that she did, and as a

witness in court, testifies to the fact. Other witnesses, the son, James Graham, and a daughter of the defendant, state they were present, and heard nothing of the kind from Mrs. Graham, the wife; and that they were in a position to hear all that was said. This testimony, conflicting as it is, was passed upon by the jury, and the credibility of the witnesses weighed and considered by them; and they have given, justly, as we think, the greatest weight to the testimony of the justice of the peace, a man entirely disinterested, and under no family influence or affection. We think, in a case so situated, and one of this character, which strikes at titles with a dangerous force, that the rule adopted by this court in *Lowry v. Orr*, 1 Gilm. 70, should be applied here to sustain the verdict. In that case this court said, where the verdict depends upon the credibility of the witnesses, it is the peculiar province of the jury to judge of that credibility, and to attach such weight to the testimony of each as may seem to be proper after a due consideration of all the circumstances arising in the particular case, such as the relationship of the witness to one or both of the parties in controversy; his supposed interest in the event of the suit; his means of knowledge in respect to the matters in dispute; his appearance upon the stand; his manner of testifying; his general character for veracity, and the like; and to find their verdict accordingly.

In this case, we should have found the verdict the jury did, placing more confidence in the unbiased statements of the magistrate than in those of the children of the defendant, who, without being sensible of it, may have been, and it is natural they should have been, deeply interested to save the homestead of their parents.

As it regards James Graham, it is somewhat singular there should have been two previous trials of this case in which he was not called as a witness; and Mr. Burnham, in enumerating the persons who were present when the deed was signed, did not name James as one of them.

But another more important question remains, and that is, In the absence of fraud or imposition in proving the execution of a deed by a wife, is parol evidence admissible in an action of ejectment to impeach the certificate?

We have examined the authorities on this point, and we think where the certificate of the privy examination of a married woman is in the form required by the statute, it is not sufficient, in order to impeach it, to allege that there was no

private examination; that she did not acknowledge the deed as her act and deed; that she did not release her homestead right. There must be some allegation of fraud or imposition practiced toward her; some fraudulent combination between the parties interested and the officer taking the acknowledgment: *Ridgely v. Howard*, 3 Har. & McH. 321; *Jamison v. Jamison*, 3 Whart. 557 [31 Am. Dec. 536]; *Hartley v. Frosh*, 6 Tex. 208 [55 Am. Dec. 772].

The certificate of the officer as to the acknowledgment must be judged of solely by what appears on the face of the certificate, and if that is in substantial compliance with the statute, it ought not to be impeached except for fraud and imposition.

There being no error in the record, the judgment is affirmed. Judgment affirmed.

DEFECTS IN ACKNOWLEDGMENT, WHEN FATAL AND WHEN NOT: See *Tully v. Davis*, 83 Am. Dec. 179, note 180, where other cases are collected.

CERTIFICATE OF ACKNOWLEDGMENT, HOW FAR CONCLUSIVE: See *Central Bank v. Copeland*, 81 Am. Dec. 597, note 602. When the certificate of acknowledgment appears to be substantially in the form prescribed by the statute, such certificate is conclusive, and can only be impeached for fraud or imposition: *Hill v. Bacon*, 43 Ill. 478; *Monroe v. Poorman*, 62 Id. 527; *Lickmon v. Harding*, 65 Id. 506; *Canal and Dock Co. v. Russell*, 68 Id. 431; *McPherson v. Sanborn*, 88 Id. 152; *Blackman v. Hawks*, 89 Id. 514, all citing the principal case. The certificate cannot be varied by parol evidence: *Martin v. Hargardine*, 46 Id. 325, also citing the principal case.

TRUSTEE SELLING CONTRARY TO CONDITIONS OF TRUST, EFFECT OF: See *Cassell v. Ross*, 85 Am. Dec. 270, note 277, where other cases are collected. If the trustee in a trust deed sells contrary to the conditions of the deed, the remedy is in equity, and is not available in an action of ejectment: *Dawson v. Hayden*, 67 Ill. 54; *Koster v. Burke*, 81 Id. 439; *Chapin v. Billings*, 91 Id. 543, all citing the principal case.

THE PRINCIPAL CASE IS ALSO CITED IN *Chapin v. Billings*, 91 Ill. 543, to the point that where a trust deed recites an indebtedness, the presumption of indebtedness continues until rebutted by proof of payment.

McCONNEL v. KIBBE.

[48 ILLINOIS, 12.]

SEVERAL PERSONS MAY TOGETHER OWN A THING WITHOUT BEING CO-TENANTS THEREOF.

IT IS ALWAYS INDISPENSABLE THAT SUBJECT OF EVERY COMPULSORY PARTITION should be held in co-tenancy. Therefore, premises belonging in severalty to two, and no portion of them belonging jointly to both, are not subject to partition. either in equity or under the statute

THE facts are stated in the opinion.

M. McConnel, plaintiff in error, *pro se*.

H. B. McClure, for the defendant in error.

By Court, BREESE, J. This was a bill in chancery exhibited in the Morgan circuit court by Murray McConnel, complainant, against Jairus Kibbe, defendant, for partition of a certain house and lot of ground in Jacksonville, in that county. The cause proceeded to a final hearing on the bill, answer, and testimony, resulting in a decree dismissing the bill. To reverse this decree this writ of error is prosecuted by complainant.

The nature of the controversy will be understood from a brief statement of the leading facts.

The property in question was a large two-story brick building and an L, once used as a hotel, and known as the Morgan House. Kibbe purchased it of one Davenport, who had purchased it at a sale made by William Thomas, the master in chancery of Morgan County, acting under a decree of the circuit court of that county. Prior to the execution of the deed to him by the master, Kibbe sold to McConnel designated portions of the building, and by arrangement between them, the master executed to McConnel a separate deed to him for his portion, and a separate deed to Kibbe for the portion he retained.

To ascertain precisely the rights of these parties, and what interests they respectively hold, resort must be had to these deeds.

In the deed to Kibbe, it is recited that "said Kibbe retains of the purchase made by him of Davenport the following parts of the said premises: 1. The ground on which the main building of the Morgan House stands, and the said house up to the second story as it now stands, said story being ten feet high, more or less, from the ground-floor to the center of the joists of the second floor [the ground is then described by metes and bounds], and which said ground is retained by said Kibbe, the said McConnel having the right to use and occupy forever the cellar under the west side of the said main building, and to pass to and from the same by passages and doors now in use, as well as such passages and doors as he may hereafter make; 2. Kibbe retains the ground on which that part of the (L) ell to the Morgan House stands, which was purchased, and the building up to the second story as it now stands, the said story being nine feet high, more or less, from

the ground-floor to the middle of the joists of the second floor; said ground is bounded as follows [here follows the boundaries]; 3. Kibbe retains the right to use the well on the premises, and of having access to the same from his premises forever, and also the right to use the passages opened and to be opened through and around the premises for the use of all the owners of the property purchased of said Davenport, as hereinbefore stated; 4. The right of way three feet wide and not less than seven feet high between the brick wall last named and the north wall of the main building of the Morgan House; 5. The right of way three feet wide on the west side of the (L) ell, extending from the center of the brick wall on the north line of the purchase from Davenport to the north line of the main building and the said Kibbe having complied with the terms of sale, etc., the said Thomas, in consideration of the premises, and by virtue of the power vested in him by the said decree, does hereby grant, bargain, sell, and convey unto the said Kibbe the parts of the said premises retained by him as aforesaid, together with the appurtenances thereof, subject, however, to a vendor's lien, etc. To have and to hold the said premises to him, the said Kibbe," etc.

The deed from the master in chancery to McConnell describes his interest, after reciting the above provisions in the deed to Kibbe, as follows: "And said Kibbe subsequently sold to said McConnell the following parts of the premises purchased by him as aforesaid, at three thousand dollars, payable to the owner of the premises as part of the purchase-money, payable to [by] said Kibbe as aforesaid, viz., the ground and premises following: 1. Beginning at the northeast corner of the main building of the Morgan House fifty feet, more or less, north of the southeast corner of said lot 61, running from thence north eleven feet fourteen inches, more or less, to the center of a brick partition wall running east and west, thence west thirty-one feet six inches, thence south eleven feet fourteen inches, more or less, to the wall of the main building of the Morgan House, and thence east to the beginning, subject to a right of way, which is hereby reserved for a passage three feet wide and not less than seven feet high, from the door in the south end of the kitchen to the north end of the main building, which is to be opened and kept open, so that it may be used as a passage at all times forever; 2. The right of way for a passage three feet wide on the west side of the west line of the aforesaid eleven feet fourteen inches, extend-

ing the whole breadth thereof, also a right of way three feet wide, extending twenty-one feet north, from the north end of the last-named passage, which two passages, three feet wide as aforesaid, are to be kept open and used in common by all of the owners of the property purchased by said Davenport as aforesaid; 3. The right of way for a passage three feet wide, from the termination north of the last-named passage to the north end of lot 61, by the lines and courses set out in this deed in describing the property purchased by said Kibbe, which last-named passage, by the lines and courses aforesaid, is granted to said McConnell, and his heirs and assigns; 4. The use of the cellar forever under the west side of the main building of the Morgan House, and the right of passing to and from the same by doors and passages now in use, as well as such other doors and passages as said McConnell may hereafter make; 5. The Morgan House, and that part of the L to the same, purchased by said Kibbe above the first story of each building as they now stand, the first story of the Morgan House being ten feet high, more or less, from the ground-floor to the middle of the joists of the second floor, and the first story of the ell being nine feet high, more or less, from the ground-floor to the middle of the joists of the second floor; said McConnell to have, use, and occupy the said building above the first stories aforesaid forever, and in case of the destruction of the said buildings, or either of them, said McConnell to have the right to make and continue up walls upon walls, which may be made for any new building, to any height consistent with the safety of the building; which said premises being purchased by said McConnell as aforesaid, he, the said McConnell, pays the sum of \$750 of the purchase-money payable by said Kibbe, and executes three promissory notes, etc., and agrees that a vendor's lien be retained upon the premises purchased by him for the payment of said promissory notes. Wherefore, in consideration of the premises, and by virtue of the power vested in him by the decree herein recited, he, the said Thomas, does hereby grant, bargain, sell, and convey unto him, the said McConnell, the ground and premises sold to him by said Kibbe, as hereinbefore described, together with the appurtenances thereof, subject to a vendor's lien, etc. To have and to hold the same unto him, the said McConnell, and his heirs and assigns forever."

The parties went into possession of their respective portions, and were so in possession at the time of filing the bill of com-

plaint. Kibbe commenced making alterations in his portion of the building, consisting chiefly in the removal of a partition wall, which divided his part into two rooms, so as to make one large storeroom for the sale of goods and merchandise, leaving portions of this wall standing to support the upper floors. McConnell also made alterations to suit his fancy in the upper rooms. McConnell complained that the removal by Kibbe of this wall caused his portion of the building to settle, to his injury, and for that he brought an action at law, and having failed to recover, he brought the record to this court, and the judgment was affirmed: *McConnell v. Kibbe*, 33 Ill. 175.

The condition of the property being so anomalous, and causing much irritation and litigation between the parties, McConnell proposed to have the property valued, and he would give Kibbe his share of the valuation, or would take from Kibbe his own share of the valuation, so that the property might be the exclusive property of one or the other; or that a sale should be made, and the proceeds thereof divided according to their respective interests in the property, both which propositions Kibbe declined.

McConnell then filed this bill for a partition, which, on the hearing, was dismissed, for the reason that a court of chancery had no jurisdiction of the subject, there being no joint estate in the property shown, but a separate estate, in separate and distinct parts thereof, as shown by the deeds of the master in chancery.

It is contended by the counsel for the defendant in error that, inasmuch as there is no joint estate, and no joint possession or right to possession of the parts of the lot and house conveyed by the master, there can be no division or partition, and all questions arising between the parties in regard to their respective rights in the lot and house are to be determined upon the same principles applicable to separate and independent proprietors of adjoining tracts of land; and he insists that the bill is founded on the novel idea of compuleory fusion of estates by the power of the court, to be followed by a sale, and finally by a distribution, and that to be made upon principles as novel as the project of fusion, for which, he insists, there is no authority or precedent.

On the other hand, the plaintiff in error claims that all men have a legal right to a partition of property held jointly, and on this idea he says his bill is based.

Admitting this proposition, which is made by complainant the foundation of his claim, this case must fall to the ground; for the fact is undeniable that the estates created by the master's deeds are not joint, but several. Portions of the premises particularly described belong in severalty to each of these parties, and no portion of it jointly to both. They have a common property in the easements and walls, but no such interest as is susceptible of division under our statute regulating the partition of estates, or under any proceeding known in courts of equity, for they parcel out such estates only as are held jointly, in common or in coparcenary.

The complicated nature of these several holdings as shown in the bill, and the litigation to which they have given rise and may hereafter prompt, is unfortunate, perhaps, for both parties, but we are not aware of any principle of law or equity which can compel either party to dissolve the connection, or to part with his separate portion of the premises.

We are satisfied neither a court of law nor equity has jurisdiction over the case as presented by these pleadings, and accord with appellee in the proposition that no power exists to compel the fusion of these estates, to be followed by a sale, and finally by a distribution of the proceeds. The idea of the plaintiff in error that he and the defendant in error hold this property jointly is not supported by the title deeds. They are neither joint tenants, tenants in common, nor coparceners; but they severally, each for himself, own distinct parts and portions of the premises, the character of which a court of chancery has no power to change. The circuit court could pass no other decree than the one entered, dismissing the bill on the hearing, as to all the matters therein, except for a conveyance of the middle cellar under the Mansion House. The decree is affirmed. The abstract of plaintiff in error not having been in compliance with rule 11 of this court, and the defendant in error having furnished a full abstract, the costs of the same will be taxed against the plaintiff in error.

Decree affirmed.

AS SUPPORTING BOTH POINTS OF SYLLABUS, SUPRA, see *Freeman on Co-tenancy and Partition*, sec. 431.

WHO MAY COMPEL PARTITION: See extended note to *Nichols v. Nichols*, 67 Am. Dec. 703.

DIETRICH v. MITCHELL.

[43 ILLINOIS, 40.]

SIGNATURE OF PAYEE ON BACK OF NOTE DOES NOT AUTHORIZE PRESUMPTION, in absence of all proof, that he placed it there as a guarantor, nor justify the holder in writing a guaranty over the name.

PAYEE'S NAME ON BACK OF NOTE RAISES PRESUMPTION that he placed it there as assignor, with a view to assume the liabilities of an assignor.

GUARANTY WRITTEN ABOVE INDORSER'S NAME ON ANOTHER'S WRITING RAISES NO PRESUMPTION that it was done by his authority, or that the contract was there when he wrote his name, where the plea denies the guaranty under oath.

TO CHARGE INDORSING PAYEE AS GUARANTOR, PLAINTIFF MUST SHOW that he contracted as guarantor; and no inference to that effect can be drawn from his blank indorsement.

STRANGER INDORSING NOTE AT TIME OF EXECUTION IS PRESUMED to indorse as guarantor.

ATTORNEY CANNOT BE COMPELLED TO TESTIFY whether or not a note placed in his hands by a client was indorsed, or had other writing upon its back.

THE facts are stated in the opinion.

Morrison and Epler, for the plaintiff in error.

H. T. Atkins, for the defendant in error.

By Court, LAWRENCE, J. This was an action of *assumpsit* brought by Mitchell against Dietrich, as guarantor of a promissory note. The note had been given by one Clifton to Dietrich, as payee. It had been indorsed by the latter. and over his name, in a different handwriting, was written an assignment and a guaranty. He filed a plea denying under oath the execution of the guaranty. The jury found a verdict for the plaintiff, and the defendant brings up the record.

On the trial the plaintiff asked, and the court gave, the following instruction:—

"2. The court further instructs the jury for the plaintiff that the plaintiff in this case, under the pleadings herein, in order to make out a *prima facie* case to entitle him to recover a verdict, is only bound on his own part to put the note in the declaration mentioned in evidence, and to prove the signature of the defendant Dietrich, indorsed upon the back of said note, to be his true and genuine signature; and if the jury find such facts proven, and find no evidence offered on the part of the defendant, that the contract of assignment and guaranty written on said note, over said defendant's signature, was not warranted by the agreement of the parties plaintiff and defendant herein, they will find for the plaintiff."

The defendant asked, and the court refused, the following instruction:—

"2. If the jury believe, from the evidence, that the note in evidence in this case, when negotiated by defendant, was indorsed in blank by him, then it devolves upon the plaintiff, before he can recover in this case, to prove to the satisfaction of the jury that defendant agreed to guarantee the payment of the note, or previously authorized or subsequently sanctioned the written guaranty indorsed upon the note."

The instruction given for the plaintiff should have been refused, and that refused for the defendant should have been given. If the name of the payee is found on the back of a note, the presumption in this state, in the absence of proof, is, that he has placed it there as assignor, with a view to assume the liabilities of an assignor under our statute. If it is sought to charge him as guarantor, the plaintiff must show that he contracted as guarantor: *Camden v. McKoy*, 3 Scam. 437 [38 Am. Dec. 91]; *Webster v. Cobb*, 17 Ill. 459; *Bogue v. Melick*, 25 Id. 91; *Blatchford v. Milliken*, 35 Id. 439. No such inference is to be drawn from the indorsement of his name in blank, as seems to be implied in the giving of one of the above instructions and the refusal of the other. And when, as in the present case, the defendant, being sued as guarantor, denies under oath the execution of the guaranty, the burden of proof is on the plaintiff. The fact that a contract of guaranty is found written above the name of the indorser, in a handwriting not his own, would not, of itself, be sufficient to raise a presumption that it was done by his authority, or that the contract was there when he wrote his name, because the presence of his name is to be accounted for by the fact that, as payee of the note, it was necessary for him to indorse it, in order to give it negotiability. To hold that any person through whose hands a note may pass can write a guaranty over a blank indorsement, and then require the indorser to disprove it, would be fruitful of fraud, and dangerous to every person who has occasion to receive and indorse a promissory note.

The case of *Hance v. Miller*, 21 Ill. 636, is quoted by counsel for the defendant in error as announcing a different rule. In that case there was one count against the defendant as guarantor and another against him as assignor under the statute. On the trial, the plaintiff entered a *nolle prosequi* to the count on the guaranty, and recovered under the other count by proving the insolvency of the maker. When the case came here,

it was urged, if the guaranty which had been written over the name of the indorser was in fact unauthorized, the writing of such a guaranty was a fraudulent alteration of the indorsement, and destroyed the validity of the assignment for all purposes whatsoever. Upon this point, the court said it would not, in the absence of all proof, presume the guaranty was unwarranted, and by such presumption vitiate the assignment, if such would be the legal effect. But to refuse to presume a guaranty to have been unauthorized, for the purpose of destroying an assignment admitted to have been executed in blank, is a very different thing from presuming the guaranty to have been authorized when a recovery is sought upon such guaranty. In such cases, if the execution of the guaranty is denied under oath, the party claiming its benefit must show such a contract was really made. This has been the settled law of this state ever since the decision in *Camdem v. McKoy*, above cited. What we here decide is, that the mere signature of the payee of a note, upon its back, does not authorize the presumption, in the absence of all proof, that he placed it there as a guarantor, nor justify the holder in writing a guaranty over the name. The second instruction asked by the defendant should, therefore, have been given, and the second given for the plaintiff should have been refused, as tending to mislead the jury. When a stranger to the note indorses it in blank at the time of its execution, a different rule of course applies. He is presumed to indorse as guarantor. This was held in the cases above cited.

As this case must be remanded for another trial, it is proper that we should dispose of another question discussed in the argument. On the trial, Mr. McConnel was called by defendant as a witness, and he testified he had brought a former suit on this same note, and when the note was in his hands, the name of Dietrich, the defendant, was indorsed on the note, but no guaranty was written above it. This evidence was objected to as falling within the rule of privileged communications between attorney and client. The objection is valid. A similar question is very fully considered in the case of *Brown v. Payson*, 6 N. H. 443; and, after reviewing all the authorities, the court hold, an attorney cannot be compelled to testify as to whether a promissory note was indorsed when placed in his hands for collection. In *Robson v. Kemp*, 5 Esp. 52, Lord Ellenborough held an attorney could not be compelled to prove the destruction of a written instrument in his presence, and

while he was acting as attorney. "One sense," said the court, "is privileged as well as another. He cannot be said to be privileged as to what he hears, but not as to what he sees, where the knowledge acquired as to both has been from his situation as an attorney." The pith of the question is presented in these few words. So in *Wheatley v. Williams*, 1 Mees. & W. 541, the court held, all the judges concurring, that an attorney could not be compelled to state whether an instrument, when shown to him by his client, was stamped or not. The counsel for appellant cite *Baker v. Arnold*, 1 Caines, 257, as laying down a different rule. The supreme court of New Hampshire, *ubi supra*, in commenting on this case, point out the inaccuracy of the reporter's note, and that Radcliff, J., alone sustained this position, while Thompson and Livingston, JJ., held the evidence inadmissible, and Kent, J., and Lewis, C. J., gave no opinion on the point. The only other case cited by the counsel for appellant bearing directly on this question is *Heister v. Davis*, 3 Yeates, 4, and the case is very brief and not much considered. The weight of authority is against the admissibility of the evidence, and this rule is founded in the sounder reason. If the knowledge comes to the attorney through his professional relation to his client, we cannot perceive that it is important whether, in the language of Lord Ellenborough, it is by what he sees or what he hears. For the error in the instructions the judgment is reversed and the cause remanded.

Judgment reversed.

WHERE NAME OF PARTY NOT PAYEE IS ON BACK OF NOTE, IT WILL BE PRESUMED, in absence of explanatory evidence, that he placed it there at the time of execution, and that he indorsed it as guarantor; and upon proof of a legal consideration, he may be charged as such: *Tenney v. Prince*, 16 Am. Dec. 347, note 349; extended note to *Perkins v. Callin*, 29 Id. 297-299, discussing the effect in various states of an indorsement in blank of a promissory note by a person other than the payee or holder; *Childs v. Wyman*, 69 Id. 111; *Whiton v. Mears*, 45 Id. 233, note 235; extended note to *Camden v. McKoy*, 38 Id. 99; *Carroll v. Weld*, 56 Id. 481, note 482; extended note to *Fitzhugh v. Love's Ex'r*, 3 Id. 571-575; *Colburn v. Averill*, 50 Id. 630. But in some cases such person is held liable as an original maker: See cases cited in notes to *McComb v. Thompson*, 72 Id. 89, and *Moore v. Cross*, 75 Id. 330.

THIRD PERSON'S INDORSEMENT AFTER PRIOR INDORSEMENT BY PAYEE will make him liable as a subsequent indorser: *Colburn v. Averill*, 50 Am. Dec. 630.

GUARANTY MAY BE WRITTEN OVER INDORSER'S SIGNATURE WHEN: See note to *Camden v. McKoy*, 38 Am. Dec. 99; *Whiton v. Mears*, 45 Id. 233.

COMMUNICATIONS TO ATTORNEY, WHEN PRIVILEGED: See note to *Thompson v. Kilborne*, 67 Am. Dec. 745. Attorney must not disclose contents of papers

intrusted to him by his client for his professional advice: See note to *Covey v. Tannahill*, 37 Id. 296.

THE PRINCIPAL CASE WAS CITED in *Boynston v. Pierce*, 79 Ill. 146, to the point that where the name of a party not the payee is found written on the back of a note, it will be presumed, in the absence of explanatory evidence, that he placed it there at the time of making the note, and that he indorsed it as guarantor. Such an indorsement in blank is authority to the holder of the note to write over the signature anything that is consistent with the undertaking; and as the undertaking is primarily that of a guarantor, it is proper for the holder to write a guaranty over the name on the back of the note: Id. In a suit on such guaranty, where the defendant pleads the general issue, verified by affidavit, all that the plaintiff is required to prove is the signature of the defendant. The rule, however, would be different if the holder of a note indorsed in blank by the payee should write a guaranty over the signature and bring suit on it as a guaranty. In such a case, if the defendant should deny the guaranty under oath, the burden of proof would be upon the plaintiff to show that a contract of guaranty was intended: Id. The principal case was cited and distinguished in *Lynn v. Lyerlee*, 113 Id. 134, where it was held that where two parties go together to an attorney, and make statements to him in the presence of each other, such statements are not confidential communications intended to be withheld from the opposite party, and there is no error in permitting the attorney to testify thereto in a suit between the parties relating to the subject-matter of such communications. The principal case merely asserts the general rule that communications made by a client to his attorney in reference to his case are privileged, and cannot be testified to by the attorney.

ST. LOUIS, ALTON, AND TERRE HAUTE RAILROAD COMPANY v. SOUTH.

[43 ILLINOIS, 176.]

RAILROAD COMPANY IS NOT REQUIRED TO KEEP OPEN ITS TICKET-OFFICE for sale of tickets to passengers beyond advertised time fixed for the departure of trains; and *Chicago etc. R. R. v. Parks*, 18 Ill. 460, S. C., 68 Am. Dec. 562, and *St. Louis etc. R. R. Co. v. Dalby*, 19 Ill. 353, are not to be considered as holding that such company must keep its office open for that purpose until the actual departure of the train.

RAILROAD COMPANY IS REQUIRED TO KEEP OPEN ITS TICKET-OFFICE FOR SALE OF TICKETS to passengers for a reasonable time before the departure of each train, and up to the advertised time for its departure, but not up to the time of its actual departure.

RAILROAD COMPANY IS REQUIRED TO FURNISH CONVENIENT AND ACCESSIBLE PLACE FOR SALE OF TICKETS, and to afford the public a reasonable opportunity to purchase them; but parties who will not avail themselves of it are alone at fault, and must pay the extra fare or be ejected from the train on refusal to pay it.

RAILROAD COMPANY'S RIGHT TO DISCRIMINATE IN ITS FARE between those who purchase tickets and those who do not is just and reasonable, but is dependent on the fact that a reasonable opportunity has been given to obtain tickets at the lowest rate of fare.

MOTION FOR RULE ON PLAINTIFF TO FILE SECURITY FOR COSTS COMES TOO LATE after issue joined and the cause has been called for trial.

IN ACTION OF TRESPASS AGAINST SEVERAL DEFENDANTS, JURY CANNOT ASSESS DAMAGES severally against them.

ERROR CAUSED BY INSTRUCTION THAT JURY MAY ASSESS DAMAGES SEVERALLY AGAINST SEVERAL DEFENDANTS IN TRESPASS IS CURED by the entry of a *nolle prosequi*, before judgment upon the verdict, against all the defendants but one, and taking judgment against him alone.

TRESPASS by appellee against the appellants, the railroad company, and Austin, Rhodes, Lee, and Dawson. There was a jury trial and verdict of guilty. Damages were assessed severally against defendants; but a *nolle prosequi* was entered as to all the defendants except appellant, and judgment was rendered against the company for three hundred dollars. Motions for a new trial and in arrest of judgment were made and overruled, and the company appealed. Other facts are stated in the opinion.

Wiley and Parker, for the appellants.

John Scholfield, for the appellee.

By Court, BREESE, J. The principal questions in this cause arise upon the instructions given on behalf of the plaintiff, and on those refused as asked by the defendants, the appellants here, and on the measure and amount of damages, the former of which we will notice.

The first instruction asked by the plaintiff, and given, was this:—

“It was the duty of the St. Louis, Alton, and Terre Haute Railroad Company to furnish a convenient and accessible place for the sale of tickets for passengers, with a competent person in attendance ready to sell them, which should be open and accessible to all passengers for a reasonable time before the departure of each train, and up to the time of its actual departure; and if the jury believe from the evidence that the plaintiff, by and through Allison, made application at the ticket-office of the St. Louis, Alton, and Terre Haute Railroad Company, at Mattoon, for a ticket from that place to Charleston, at any time within ten or fifteen minutes before the actual departure of its train, and he was unable to get a ticket in consequence of the ticket-office being closed, then the St. Louis, Alton, and Terre Haute Railroad Company had no right to charge him upon the train any more than usual ticket price between Mattoon and Charleston.”

The first instruction asked on behalf of the defendants, and refused, was as follows:—

“That if they find from the evidence that the defendant, St. Louis, Alton, and Terre Haute Railroad Company, has a convenient and accessible office, supplied with and for the sale of tickets in Mattoon; that on the evening of the alleged trespass the same was open, with a competent person in attendance to sell tickets for an hour before and up to the expiration of the time fixed by public notice for the departure of the train on which plaintiff took passage; that the plaintiff got upon said train to travel from Mattoon to Charleston without procuring a ticket, and refused to pay, or cause to be paid, to the conductor of said train the amount of fare or passage money required by the regular tariff of said company for passengers who fail to produce tickets, and that by reason of such failure of plaintiff to pay or cause to be paid such fare or passage money he was expelled from the cars of said company by the servants or employees of said company at a regular station on said railroad,—then in that case the jury must find the defendants not guilty.”

The point of difference is obvious. While the instruction for the plaintiff requires the ticket-office to be kept open up to the time “of the actual departure of the train,” that for the defendant limits that duty “to the expiration of the time fixed by public notice” for the departure of the train.

It is insisted by the appellee that the law is as declared in the instruction given in his behalf, and has been so held by this court in the case of *Chicago etc. R. R. Co. v. Parks*, 18 Ill. 460 [68 Am. Dec. 562]; and reiterated in *St. Louis etc. R. R. Co. v. Dalby*, 19 Id. 364; and that the instruction is an exact transcript of the language of this court in the cases cited.

In this the counsel is not mistaken. In the case first cited this court said: “To justify a railroad company in making a discrimination in the fare against the passenger who neglects to purchase a ticket at the company’s office, the company must see to it that the fault was not that of its own agent instead of the passenger. To justify this discrimination, every reasonable and proper facility must be afforded to the passenger to procure his ticket. They must furnish a convenient and accessible place for the sale of the tickets, with a competent person in attendance ready to sell them, which should be open and accessible to all passengers for a reasonable time before the departure of each train, and up to the time of its

actual departure, so that it shall really be a case of neglect, and not of necessity, on the part of the passenger, and not the fault of the company." Further on, in the next paragraph but one, the court call these remarks "suggestions," and give the reason why they were made, the point to which they apply not being in the case before them. The controversy there was this: Parks, an attorney at law, residing at Aurora, in Kane County, took the train there, without purchasing a ticket, for Batavia, the nearest point to Genoa, where the court was held, and which Parks was going to attend. He paid the extra fare required of those who pay on the car from Aurora to Batavia. At the latter place he changed his mind, and as it was wet, disagreeable weather, he concluded, without purchasing a ticket, to proceed on to Junction, another station on the road. The ticket fare from Batavia to Junction was twenty cents, which Parks offered to pay to the conductor, but he refused it, demanding, under his instructions, an additional five cents, which Parks refusing to pay, the conductor put him off the train. This was the case in which the "suggestions" above quoted were made. The court, and the learned judge, afterward so long the honored chief justice of the court, who delivered the opinion, were well aware of the fact that the time of the arrival and departure of railroad trains was fixed, and made notorious by publication and notice in every conceivable mode, so that it may be safely asserted the business and traveling public, all those whose pursuits required that mode of conveyance, and especially those living in the towns through which railroads pass, were perfectly familiar with the fact, and almost any inhabitant, if inquired of, could tell to a minute when any particular train was due at their town, and when it would leave.

In speaking, then, of the time of the actual departure of a train, up to which the ticket-office must be kept open, the court unquestionably meant to be understood as referring to the published fixed time which everybody knew. The presumption being that trains will arrive and depart on their schedule time, which time is notorious, no rule should be established that should apply, without much hardship and great inconvenience, to the departure of trains not on time. We do not recognize any right in any person to apply at a railroad ticket-office after the time fixed and published for the departure of a train, and demand the same rights and privileges accorded to those who come at the proper time for their

tickets. It is well known that trains are sometimes delayed for hours, and that it is unavoidable. Would it not be going too far to require the companies controlling them to keep an agent at his post during all this delayed time? Tickets are not usually applied for by passengers after the time fixed for the departure of a train. The companies have a right to presume they will not be applied for after that time, and therefore their agents can close the ticket-office and go about their other business, of which they have an abundance, if we are to judge from the number of trains upon our railroads.

An agent at a railroad station who sells tickets is not only "ticket agent," but he is the "station agent," and has much to do with freight and other matters requiring care and attention. It would be unreasonable to require him to neglect these matters, and confine him within reach of the small opening at which the tickets are delivered, waiting for a delayed train, and not a passenger applying for a ticket. It is sufficient for the company that a reasonable opportunity should be afforded passengers to procure tickets for the train he designs to go upon, and that reasonable opportunity is furnished by keeping a convenient office open under the charge of a competent agent up to the advertised time fixed for the departure of the train. The facts in this case show that the ticket-office was open an hour before the train left, and continued open up to the time fixed for its departure. The plaintiff, coming after that time, took his chances to get a seat in the car, and having no ticket, he was bound to pay car fare.

We are of opinion the court should have refused the first instruction for the plaintiff, and given the first asked by defendants, the company not being obliged to keep the ticket-office open beyond the hour fixed by its published rules for the departure of a train.

These being the views we entertain of the law of this case, the modification of the defendants' eighth instruction was also erroneous, as by that the office is required to be kept open up to the time of the actual departure of the train.

All that can be demanded of a railroad company is, that a reasonable opportunity shall be afforded the public to purchase tickets. If parties will not avail of it, it is their own fault, and if they get upon a train without a ticket, they must be subject to pay the car fare, or on refusal to be ejected from the car. In Parks's case this court said the right to charge discriminating fares was just and reasonable, but it depends on

the fact that a reasonable opportunity has been given to obtain tickets at the lowest rate of fare. This opportunity was afforded the appellee.

A minor point as to the ruling of the court on the motion and affidavit of defendant's counsel to rule the plaintiff to give security for costs on the ground of his insolvency has been raised. The bill of exceptions shows this motion was made, and the affidavit is incorporated into it.

This motion was denied by the court.

The statute provides: "If in any case the court shall be satisfied that any plaintiff is unable to pay the costs of suit, or that he is so unsettled as to endanger the officers of the court with respect to their legal demands, it shall be the duty of the court, on motion of the defendant or any officer of the court, to rule the plaintiff, on or before a day named, to give security for the payment of costs in such suit": *Scates's Comp.* 244.

The affidavit states that affiant had just learned that the plaintiff was insolvent, and at the time the motion was made the record shows issue had been joined and the cause had been called for trial. This court said in *Selby v. Hutchinson*, 4 Gilm. 319, "that this motion was addressed to the discretion of the court, and the decision upon it could not be assigned for error." We think the motion was too late.

Another objection is made by appellant to the instruction to the jury, that they could assess damages severally against the defendants. The instruction was erroneous, but the error was cured by the entry of a *nolle prosequi* before judgment upon the verdict against Austin and Lee, and taking judgment against the company alone: 1 Tidd's Pr. 682. We cannot see that this instruction, wrong as it was, prejudiced the appellant in any way.

The judgment of the circuit court is reversed and the cause remanded, with directions to award a *venire de novo*.

Judgment reversed.

DISCRIMINATION BETWEEN FARE PAID ON TRAIN AND FARE PAID AT TICKET-OFFICE, railroad company has right to make: See extended note to *Commonwealth v. Power*, 41 Am. Dec. 483; *Hilliard v. Gould*, 66 Id. 765; *Chicago etc. R. R. Co. v. Parks*, 68 Id. 562; note to *Johnson v. Concord R. R. Corp.*, 88 Id. 208.

WHERE ACTION FOUNDED UPON TORT IS BROUGHT AGAINST SEVERAL DEFENDANTS, and a verdict is awarded for the plaintiff, the latter may, after verdict, enter a *nolle prosequi* as to some of them, and take his judgment

against the others: *Hardy v. Thomas*, 68 Am. Dec. 152. But in actions *ex contractu* the rule is different. Plaintiff must recover against all of the defendants or none: *Benjamin v. McConnell*, 46 Id. 474.

IN ACTIONS AGAINST SEVERAL DEFENDANTS FOR THEIR JOINT TRESPASS, damages may be severed and apportioned: *Smith v. Singleton*, 39 Am. Dec. 122; but see *Bivins v. McElroy*, 52 Id. 258; extended note to *Blann v. Crocheron*, 54 Id. 205, 206.

PASSENGER MAY BE EJECTED FOR REFUSAL TO PAY FARE OR EXTRA FARE, WHEN: See extended note to *Commonwealth v. Power*, 41 Am. Dec. 476, 483; *Chicago etc. R. R. Co. v. Parks*, 68 Id. 562, and extended note thereto on expulsion of passengers, showing how, where, and when it may be exercised: *Chicago etc. R. R. Co. v. Flagg*, post, p. 133; *Illinois Cent. R. R. Co. v. Whittemore*, post, p. 138; note to *Johnson v. Concord R. R. Corp.*, 88 Id. 208; note to *Sandford v. Eighth Avenue R. R. Co.*, 80 Id. 290; *O'Brien v. Boston etc. R. R. Co.*, 77 Id. 347, note 349; *State v. Overton*, 61 Id. 671.

THE PRINCIPAL CASE WAS CITED IN *Swan v. Manchester etc. R. R.*, 132 Mass. 118, to the point that it is a part of a railroad company's duty under all circumstances to afford a reasonable opportunity to obtain its tickets. In that case, it was held that a regulation of a railroad corporation that a passenger who purchases a ticket before entering its cars shall be entitled to a discount from the advertised rates of fare, but that if such ticket is not purchased, the full rate of fare shall be charged, is a reasonable regulation, and does not violate a rule prescribed by statute that the rates of fare shall be the same for all persons between the same points. Also, that if a railroad corporation advertises to carry passengers purchasing tickets at a less rate than the regular fare, it is not bound to keep its ticket-office at a particular station open after the time when a train of cars is advertised to leave that station; and that if a person arrives after that time, and enters the train of cars without a ticket, he may, in accordance with the regulations of the corporation, be expelled for refusing to pay full fare, although he was unable to procure a ticket in consequence of the ticket-office being closed. To each of the above propositions the principal case was cited.

PEOPLE EX REL. CLEMENS v. SMITH AND MINER.

[43 ILLINOIS, 212.]

PAYMENT OF INTEREST ON STATE BOND TO ONE NOT TRUE OWNER DOES NOT DISCHARGE STATE if the latter has not authorized the payment.

IF STATE CUSTODIAN OF MONEY PAYS INTEREST ON STATE BOND TO ONE SIMULATING TRUE OWNER, it will be no bar to a recovery by the latter, because it is no payment.

STATE DISBURSING OFFICER MUST ASSURE HIMSELF OF IDENTITY OF PAYEE IN STATE BOND; if through negligence in this respect payment of interest has been made to the wrong person, the state remains liable to pay the interest to the party entitled to it.

MANDAMUS WILL LIE AGAINST STATE TREASURER TO COMPEL HIM TO PAY INTEREST ON STATE BONDS TO TRUE OWNER; and where the auditor of public accounts, through whom alone the treasurer can pay out money from the treasury, is made a party to the application, a peremptory *mandamus* will be granted requiring him to issue a warrant on the treasury for the amount of such interest.

APPLICATION for peremptory writ of *mandamus* on the relation of James Clemens, Jr., against G. W. Smith, state treasurer, and O. H. Miner, auditor of public accounts. The facts are stated in the opinion.

James C. Conkling, for the relator.

By Court, BREESE, J. This is a petition for a *mandamus* to compel the state treasurer to pay to the relator, James Clemens, Jr., of St. Louis, the interest due upon certain bonds of this state, held and owned by Clemens.

The petitioner states that he is a resident of St. Louis, in the state of Missouri, and the owner of a bond of this state, numbered 4983, bearing date July 1, 1847, and payable to petitioner in twenty-three years from date, for the sum of \$1,085.76, with interest at the rate of six per cent per annum, payable in New York on the first day of January and July of each year; that he is also the owner and holder of a bond of the state, numbered 2150, payable to him in thirty years from July 1, 1847, for the sum of \$500, bearing interest at the rate of six per cent per annum from July 1, 1857.

He further states that on the twenty-third day of August, 1856, the sum of \$192.16 was paid to him for interest on the first-mentioned bond, and that is all he has ever received as interest on either of these bonds.

He further states that on the 12th of February, 1867, he applied by his attorney to the state treasurer, and demanded of him the balance due him for interest on these bonds, which the treasurer refused to pay.

The demand on the treasurer is fully proved. The treasurer waives the alternative writ, and alleges in justification of his refusal that the books and files of his office show that there was paid to S. Halliday, an agent of the United States Express Company, on the 15th of December, 1862, all the interest which had accrued on these bonds from 1856 up to July, 1862, amounting to \$540.84, the first payment being of the interest due January 1, 1857; that Halliday presented a power of attorney to collect this interest, purporting to have been executed by James Clemens, Jr., of the city of Philadelphia, Pennsylvania, on the 8th of December, 1862, and acknowledged before John B. Thayer, a commissioner of the state of Illinois for that city. We are called upon to say whether this payment discharged the state.

It is in evidence that these bonds, described in the petition,

are now and have always been since their issue in the possession of James Clemens, Jr., of St. Louis, Missouri; that he is an old resident of that city; and he testifies he was not in Philadelphia on the day the power of attorney bears date, and had not been in Philadelphia in the month of December for the past thirty years; and that on the eighth day of December, 1862, he was in his office in St. Louis, and on that day he drew a check on a banking house in St. Louis, which check is shown, and bears the date December 8, 1862. The petitioner in his affidavit states he never made a demand for the interest, and never authorized any person to demand it.

The affidavit of James B. Clemens shows that he is a clerk in the office of the petitioner, and was such clerk in 1862, and that on the eighth day of December of that year the petitioner was in his office in the city of St. Louis, and drew the check before spoken of, which the petitioner signed.

Another clerk in petitioner's office in St. Louis, Russel H. Mather, testifies that he entered the office as clerk in July, 1862, and remained as such until the first day of March, 1864, and during that time the petitioner was not absent for one day in the month of December; that this appears from entries in the books of the office made by petitioner, and one entry made by him on the eighth day of December, 1862.

Mr. Edwards testifies that he has long known the petitioner, and is familiar with his handwriting, and that the name "James Clemens, Jr.," signed to the power of attorney executed in Philadelphia, is not the handwriting of James Clemens, Jr., of St. Louis.

There is no question made that James Clemens, Jr., of St. Louis is not the true owner of these bonds. This being so, the payment of the interest on them to another and different person does not discharge the state, on the authority of the case of *Wilson v. Alexander*, 3 Scam. 392. If the power of attorney was not forged, but made by a person whose real name was James Clemens, Jr., but not the identical James Clemens, Jr., to whom the bonds belonged, then payment of the interest to this person simulating the true owner would be no payment. The treasurer took the risk of the identity of the payee; and if, by his negligence in not assuring himself of the identity, payment has been made to the wrong person, the state remains liable to pay the interest to the real party entitled to it. It is not usual that a custodian of money who knows his duty and wishes to perform it pays money to one of whose identity he

is not entirely satisfied. Should he pay to one simulating the real party, it will be no bar to a recovery by the latter: *Graves v. American Exchange Bank*, 17 N. Y. 205.

These bonds being the property of the relator, his demand for the interest due upon them cannot be refused by reason of anything shown.

As the auditor has become a party to this application, through whom alone the treasurer can pay out money from the treasury, a peremptory *mandamus* will issue to the auditor requiring him to issue a warrant on the treasury for the sum of \$540.84, being the interest due on the bonds described in the petition, from the twenty-third day of August, 1856, to the first day of July, 1862; and on presenting the same at the treasury, the treasurer will pay that amount to the petitioner or his authorized agent.

Mandamus awarded.

McDONALD v. CRANDALL.

[43 ILLINOIS, 281.]

DEED CONTAINING NO RELINQUISHMENT OF HOMESTEAD RIGHT CONVEYS FEE TO HOMESTEAD PROPERTY, but not the right of possession, and the grantee cannot prevail in ejectment against the grantor.

HOMESTEAD RIGHT TO VALUE OF ONE THOUSAND DOLLARS IS NOT SUBJECT TO JUDGMENT LIEN, BUT MAY BE TRANSFERRED WITH FEE, and the grantee will take it though a judgment against the grantor exists at the date of the conveyance.

SALE AND SURRENDER OF HOMESTEAD TO PURCHASER, WHO IS JUNIOR JUDGMENT CREDITOR, will be sustained as against a title derived from a sheriff's sale under the prior judgment.

JUDGMENT OR MORTGAGE LIEN MAY BE ENFORCED AGAINST ANY EXCESS in value of homestead over the amount allowed by the statute.

ABANDONMENT OF HOMESTEAD IS EFFECTED AND RIGHT TO EXEMPTION IS LOST, when the grantor conveys the premises, and places the grantee in possession of the homestead.

HOMESTEAD EXEMPTION STATUTE CREATES NO NEW ESTATE IN OWNER OF HOMESTEAD PROPERTY, but merely gives him the right to protect himself by the statute from his creditors so long as he or his family remain in possession.

GRANTEE IN POSSESSION OF HOMESTEAD PROPERTY WILL HOLD IT AGAINST SUBSEQUENT PURCHASER, though the deed to the former does not, and the deed to the latter does, release the exemption.

THE facts are stated in the opinion.

Warren and Pogue, for the appellant.

A. L. and R. M. Knapp, for the appellee.

By Court, WALKER, C. J. In this controversy both parties derive title to the lot in dispute, from the same common source. One H. C. Twombly and wife, at different times, executed trust deeds to two different trustees, to secure debts owing by him to different parties. Default having been made in payment, each of the trustees at different times advertised and sold the property, which was purchased by several persons. Appellant claims by purchase at the sale under the trust deed first executed, which was also first recorded, and under which he had entered into and was holding possession when this suit was brought to recover the premises. Appellee claims by a purchase under the trust deed last executed, and under which it was sold by the trustee in the mode required by the instrument. Twombly and wife did not, by the first trust deed, relinquish their right to claim the benefit of the homestead law, but did in the latter. It also appears that he was within the provisions of the act, and the deeds having been made after the adoption of the amendatory act of 1857, these trust deeds were subject to its provisions.

This, then, presents the question whether a deed executed subsequently to the passage of the amendatory act of 1857, without relinquishing the homestead right, is void, or whether it takes effect in case the property is surrendered and the purchaser is put into possession by the grantor. Or may he, after a sale of the fee, without releasing the homestead, and letting the purchaser in, sue for and recover the premises under the right to claim the homestead? Or can he afterward sell and convey the homestead right to another, so as to authorize the second purchaser to recover and hold the property under the homestead right as against the owner of the fee?

In the case of *Patterson v. Kreig*, 29 Ill. 514, it was held that when the wife failed to join in the release of the homestead right, the grantee did not acquire a title such as would authorize him to eject the grantor still in possession of the homestead. In that case, it appears that the grantor was within the provisions of the homestead act. And it was held that the grantee, not being in possession, could not assert it against his grantor, as he had never released it in the mode prescribed by the statute, and had not surrendered the possession. Again, in the case of *Best v. Allen*, 30 Ill. 30 [81 Am. Dec. 338], it was held that a purchaser, at a trustee's sale under a trust deed in which the wife had not released the homestead right, could not defend an action brought by the person who exe-

cuted the deed of trust, and who had not abandoned or surrendered the possession, for a trespass to the premises. Other cases decided by this court announced the same rule.

It has also been repeatedly held that the homestead right was not subject to a judgment lien; that the right could be transferred with the fee, and the grantee would take it notwithstanding a judgment was in existence against the grantor when the conveyance was made; and that the sale of the homestead and its surrender to the purchaser, who was a junior judgment creditor, would be sustained as against a title derived from a sale under the prior judgment.

It has, however, been held that where the homestead property exceeds one thousand dollars in value, a judgment, a mortgage, or deed of trust becomes a lien that may be enforced against the overplus. So of a conveyance without a release of the homestead exemption where the value exceeds the exemption, the grantee can enforce his rights against the surplus by partition or otherwise. It is only the right to claim the homestead and to continue to use and enjoy it that is protected. The ultimate fee is, no doubt, conveyed by a regular deed, properly acknowledged, although it fails to release the homestead right. But in such case the fee is subject to the right of the grantor to hold it as a homestead in the manner and for the period prescribed by the statute: *Young v. Graff*, 28 Ill. 20. In this case, it was held that the premises upon which a debtor held a homestead might be sold under a decree in chancery, subject to the exemption. The cases which hold that conveyances of the property without releasing the homestead do not affect or transfer the homestead must be understood as relating to and distinguishing between the fee, the ultimate right of property, and the exemption created by the statute; that such a conveyance passes the title to the premises, but not the right of possession as against the homestead exemption conferred by the statute. The grantee may acquire the fee or other estate of the grantor in the property, but he will retain the right to hold and enjoy it unless he abandons or releases it in the mode prescribed in the statute. And in such a case the law will protect the right until it is released or abandoned.

The question then arises, whether a grantee, by a deed which fails to release the homestead exemption, becomes invested with the right to hold the premises when the vendor has abandoned the possession, ceased to occupy them as a home-

stead, and placed his purchaser in possession. As between these parties there can be no question but that he may: *Brown v. Coon*, 36 Ill. 243. But it is contended that the homestead right is a species of estate that can only be released by a deed of conveyance. In the various cases which have heretofore come before the court, where the right has been protected as against grantees and judgment creditors, the vendor or the debtor has been in possession of the homestead, never having abandoned it, or placed the purchaser in possession. The question has not previously arisen between two voluntary grantees, in the conveyance to one of whom the exemption was released, and not to the other. In the case of *Green v. Marks*, 25 Ill. 221, it was held that the debtor, being entitled to the benefit of the act, could sell the premises and transfer the possession free from a judgment lien, as none attached. And in the case of *Bliss v. Clark*, 39 Id. 590, it was held that the grant of the homestead to a junior judgment creditor, with a surrender of the possession, would hold against a sheriff's deed, on a sale made under a prior judgment, whilst the premises were occupied as a homestead by the debtor.

When the grantor conveys the premises and places the grantee in possession of the homestead, we must hold that he thereby abandons it and the right to insist upon the exemption. The abandonment of the homestead is one of the means provided in the statute by which the right may be lost, and when he surrenders possession to his grantee he unmistakably abandons the homestead, although the deed does not contain a release of the right.

It is, however, insisted that the homestead act has created a new estate previously unknown to the law, which is claimed to be separate and distinct from the fee or other estate. That the homestead right, as distinguished from the homestead itself, may be sold and conveyed separately from the fee, and the grantee succeed to the right of possession during the life of the head of the family, or those entitled to claim its benefit, had the sale never been made. We have seen that the right to claim the benefits of the act may be lost by abandoning the homestead. When the holder conveys the premises without releasing the benefit of the act, it may be claimed by him or those specified in the act, until he abandons the homestead or surrenders its possession to the grantee. When he has done either, then the right ceases, and the conveyance before made and which conveyed the fee, but the operation of which was

suspended to acquire possession, becomes operative for the purpose for which it was executed, unless otherwise defective.

If a construction should be given to this act that it created an estate which could be conveyed to and enjoyed by others after the owner has conveyed the fee, abandoned the premises, and they had ceased to be his home, then the provision of the statute which declares that the right shall cease when the homestead is abandoned would be virtually abrogated; such could not have been the design of the law-makers. It is manifest that they intended only to protect the debtor or the vendor so long as he or his family remained in the possession, and not his grantees of the right, after selling the fee and abandoning the property as his home.

In this case the grantor let the purchaser under the first deed of trust into possession, and although he and his wife had not relinquished the homestead exemption by that deed, still the conveyance to the purchaser at the trustee's sale, when he was let into possession, became operative to hold the premises against the grantor or his subsequent grantees, either with or without a release of the homestead exemption. The operation of the first deed was to pass the fee when it was executed, but only suspended the power to acquire possession until the homestead was abandoned or possession delivered under the deed. Possession was delivered in this case to the purchaser under the first deed of trust, and the purchaser under the second deed, failing to acquire the fee, obtained no right to hold the premises as against the first grantee, by procuring a release of the homestead exemption in the junior deed of trust. That conveyed no separate estate, but simply estopped the grantors from claiming the benefit of the act as against the purchasers from the trustee, under the junior deed of trust. When the second deed of trust was cut off by a sale under the first, the fee and the release of the homestead by that deed both failed together. When the first purchaser was let in, he thereby united his fee to the right of possession, and could assert them against his grantor and all of his subsequent grantees. The judgment of the court below is therefore reversed and the cause remanded.

Judgment reversed.

OBJECT OF HOMESTEAD ACT: See *Sears v. Hanks*, 84 Am. Dec. 378; *Guio*d v. *Guio*d, 76 Id. 440.

GRANTEE OF JUDGMENT DEBTOR TAKES HOMESTEAD PROPERTY subject to lien of judgment, when: *Folsom v. Carli*, 80 Am. Dec. 429.

PERSON RIGHTFULLY IN POSSESSION OF HOMESTEAD PROPERTY UNDER CONTRACT OF PURCHASE is owner of the premises, and his title will be protected from levy and sale: *Blue v. Blue*, 87 Am. Dec. 267.

WHETHER JUDGMENT IS LIEN UPON HOMESTEAD, see extended note to *Blue v. Blue*, 87 Am. Dec. 278; *Cummings v. Long*, 85 Id. 502; *McDonald v. Badger*, 83 Id. 123, note 129; *Tillotson v. Millard*, 82 Id. 112, note 117.

SO LONG AS PREMISES ARE OCCUPIED AS HOMESTEAD, a deed without the release of husband and wife can have no effect to deprive them of the homestead, and the homestead right can be set up as a defense in any action brought to eject them from the premises: *Pardee v. Lindley*, 83 Am. Dec. 219; and setting up a homestead as a defense to an action of ejectment defeats the claim to recover the possession: See note to same case, p. 224.

ALIENATION OF HOMESTEAD AS EVIDENCE OF ABANDONMENT: See note to *Taylor v. Hargous*, 60 Am. Dec. 614.

EXCESS OR SURPLUS OVER AND ABOVE WHAT HOMESTEAD MAY COVER IS SUBJECT TO EXECUTION: *McDonald v. Badger*, 83 Am. Dec. 123; extended note to *Blue v. Blue*, 87 Id. 275, 276.

THE PRINCIPAL CASE WAS CITED in each of the above authorities, and to the point stated. Prior to the act of July 1, 1873, it was held in Illinois that the homestead exemption was not an estate, but simply an exemption; and that where the holder of the homestead conveyed without relinquishing the exemption, he transferred the fee, but the operation of the deed was suspended until the premises were abandoned, or possession was surrendered: *Finley v. McConnell*, 60 Ill. 263; *Eldridge v. Pierce*, 90 Id. 480; *Browning v. Harris*, 99 Id. 459; *Black v. Curran*, 14 Wall. 470. But the amendatory act of 1873 created an estate of homestead to the extent of one thousand dollars in value: See last two cases cited. It is not essential to the waiver of the homestead right that there should be a formal release thereof in writing; the right may be lost by an abandonment of the premises: *Vasey v. Board of Trustees*, 59 Ill. 192; and the immediate right of possession will at once attach to the owner of the fee: *Hewitt v. Templeton*, 48 Id. 370. The principal case was followed in *Coe v. Smith*, 47 Id. 225, where it was held that where a mortgagor executes a first and second mortgage on premises in which he has a homestead, without a release thereof in the first, but with a release in the second, and then abandons the premises, the first mortgage is the prior lien, and takes discharged of the homestead. A judgment or deed of trust as to property occupied as a homestead is a lien that may be enforced against the surplus of the same above the value of one thousand dollars: *Young v. Morgan*, 89 Id. 201; *Stevens v. Hollingsworth*, 74 Id. 212; *In re Poleman*, 9 Nat. Bank. Reg. 378; *Black v. Curran*, 14 Wall. 470; but the lien on the excess can only be enforced in the statutory mode: *Stevens v. Hollingsworth*, 74 Ill. 212. Although a judgment is no lien upon a homestead where the premises are worth less than one thousand dollars, and a lien only upon the surplus where they are worth more than that sum, yet where the owner conveys the same by an absolute deed or mortgage legally executed, the fee in the premises conveyed, no matter what their value, passes to the grantee, subject only to the right of occupancy on the part of the grantor, in case the homestead has not been relinquished; and when such occupancy terminates, the homestead right is annihilated, it not being an estate in the premises which can be transferred as against a former conveyance that has passed the fee: *Hewitt v. Templeton*, 48 Id. 369; *Hartwell v. McDonald*, 69 Id. 295; *Black v. Curran*, 14 Wall. 470; *Miz v. King*, 55 Id. 438. These cases, however, were decided before the act of 1873, mentioned *supra*, went into effect.

TOMLIN v. HILYARD.

[43 ILLINOIS, 300.]

PAROL PARTITION OF LANDS AMONG TENANTS IN COMMON, when followed by a several possession in conformity with the terms of the partition, gives to each co-tenant the rights and incidents of an exclusive possession of his property.

CONVEYANCE MAY BE COMPELLED BY CO-TENANT AFTER PAROL PARTITION.

Where two tenants in common have partitioned their land by parol, and each has taken possession of his allotment, one of the co-tenants may by a bill in chancery compel a conveyance of the legal title, according to the terms of the partition; because, while the legal title might not be considered as having passed, unless after a possession sufficiently long to justify the presumption of a deed, yet such parol partition followed by a several possession would leave each co-tenant seised of the legal title of one half of his allotment, and the equitable title to the other half.

HOMESTEAD LAW PROTECTS POSSESSION HELD UNDER EQUITABLE AS WELL AS LEGAL TITLE; hence, when a parol partition of lands between two tenants in common is had, and is followed by a several possession before a judgment lien attaches, each can claim the homestead right, even though the legal title to one half of his allotment be in the other co-tenant, as each holds it after partition as trustee for the other.

MERE SEVERANCE OF POSSESSION BETWEEN TENANTS IN COMMON MAY BE INFERRED FROM FAR LESS PROOF than would be required to show a sale of land to a stranger.

WITNESS CANNOT TESTIFY AS TO MATTER OF LAW, and an interrogatory necessarily involving a question of law is improper.

THE facts are stated in the opinion.

Lacey and Harndon, for the plaintiff in error.

Dummer and Prettyman, for the defendant in error.

By Court, LAWRENCE, J. This was an action of ejectment brought by Thomas F. Tomlin against David W. Hilyard, to recover forty acres of land. It appears by the record that on the 10th of March, 1856, eighty acres, of which the tract in controversy is a part, were bought by said Hilyard and one Thompson Tomlin, as tenants in common, the deed being made to them jointly. On the 1st of January, 1858, one Walker obtained a judgment in the circuit court of Mason County, where the land is situated, against Hilyard and Thompson Tomlin, on which an execution was duly issued, and the land in controversy sold on the 16th of March, 1858. The plaintiff below derived title under this sale and the sheriff's deed made thereon.

The defense was, that before said judgment was obtained the eighty-acre tract was divided between Hilyard and Thomp-

son Tomlin, the former taking the south forty acres, being the tract in controversy, and the latter the north forty; and that, although the partition was by parol, Hilyard, in the spring of 1857, took open and exclusive possession of his forty, and has occupied it with his family as a homestead from that time to the present. On the trial, a jury was waived, and the court on the evidence gave judgment for the defendant.

A parol partition between tenants in common, when followed by a possession in conformity therewith, will so far bind the possession as to give to each co-tenant the rights and incidents of an exclusive possession of his property: 1 Washburn on Real Property, 2d ed., 450; *Jackson v. Harder*, 4 Johns. 202 [4 Am. Dec. 262]; *Jackson v. Vosburgh*, 9 Id. 276 [6 Am. Dec. 276]; *Slice v. Derrick*, 2 Rich. 627; *Coles v. Wooding*, 2 Pat. & H. 189; *Wildley v. Barney*, 31 Miss. 644; *Manly v. Pettie*, 38 Ill. 136. While the legal title might not, perhaps, be considered as passing by such parol partition, unless after a possession sufficiently long to justify the presumption of a deed, yet the parol partition followed by a several possession would leave each co-tenant seised of the legal title of one half of his allotment, and the equitable title to the other half, and by a bill in chancery he could compel from his co-tenant a conveyance of the legal title, according to the terms of the partition. The homestead law protects a possession held under an equitable as well as a legal title: *Blue v. Blue*, 38 Ill. 9 [87 Am. Dec. 267]. If, then, in the case before us, there has been a parol partition before the judgment lien attached, and a several possession in conformity thereto, the homestead right can be claimed by Hilyard, even if the legal title to one half of his allotment is still in his co-tenant. He has held it since the partition merely as trustee for Hilyard.

It is insisted, however, that the parol partition in the case before us is not clearly proven. The evidence is contradictory; but while Thompson Tomlin himself denies that a partition was agreed upon, the other clearly proven facts are such strong evidence of partition that we are not inclined to set aside the finding of the court. The witness Jonathan Thompson swears that he occupied the eighty acres as tenant of Tomlin and Hilyard, in 1856; that he afterward rented of Thompson Tomlin the forty acres not in controversy in this case; that Hilyard has occupied, exclusively, the forty acres in controversy from the spring of 1857 to the present time; that this was matter of notoriety; that Tomlin claimed and occupied the

other forty by his son or tenants; and that the witness, in the spring of 1857, ran a furrow with a plow between the two forties to mark the division line. It further appears that Hilyard built a house on his forty before he moved on it, and that he planted an orchard in 1857 or 1858. Another witness swears it was notorious that Hilyard and Tomlin were claiming the eighty acres separately, and that such exclusive and separate claim and occupation have continued to the present time. All this is very strong evidence that a partition was made.

It need hardly be remarked that a mere severance of possession between tenants in common may be inferred from far less proof than would be required to show a sale of land to a stranger.

It is also objected that the court erred in not permitting the plaintiff to ask a witness "if the judgment was not obtained for the purchase-money of the land in controversy." The interrogatory was objectionable, not only because leading in form, but because it was asking a witness to swear as to what was in part a question of law. The witness should have been required to state the manner in which the indebtedness accrued. The land was not bought of Walker, the plaintiff in the judgment, but from one Blunt; and whether the debt to Walker accrued in such a way that it could be regarded as purchase-money for land bought of Blunt, as in the case of *Austin v. Underwood*, 37 Ill. 441 [87 Am. Dec. 254], must necessarily involve a legal question, which a witness is not competent to solve. So far as the facts appear from the further examination of the same witness, the judgment was not for the purchase-money. The record discloses a homestead right in the appellee, and the judgment must be affirmed.

Judgment affirmed.

AS TO FIRST POINT IN SYLLABUS, SUPRA, AND AS TO WHEN PAROL PARTITION IS VALID GENERALLY, see *Kennedy v. Kennedy*, 82 Am. Dec. 574; *Staples v. Bradley*, 60 Id. 630; *Coleman v. Coleman*, 57 Id. 641; *Bryan v. Stump*, 56 Id. 139; *McMahan v. McMahan*, 53 Id. 481, note 486; *Brown v. Wheeler*, 44 Id. 550; *Calhoun v. Hays*, 42 Id. 275; *Ryerss v. Wheeler*, 37 Id. 243, and collected cases in note thereto 245; *Dawson v. Lawrence*, 42 Id. 210; note to *De Louis v. Meek*, 50 Id. 510; *Hardy v. Summers*, 32 Id. 167; note to *Jackson v. Miller*, 21 Id. 323.

CONVEYANCE MAY BE COMPELLED BY CO-TENANT AFTER PAROL PARTITION, WHEN: *Weed v. Terry*, 45 Am. Dec. 257; *McMahan v. McMahan*, 53 Id. 481.

HOMESTEAD LAW PROTECTS POSSESSION HELD UNDER EQUITABLE AS WELL AS LEGAL TITLE: See extended note to *Blue v. Blue*, 87 Am. Dec. 273, on sale of homestead under execution.

THE PRINCIPAL CASE WAS CITED indefinitely, if not actually miscited, in *In re Parks*, 9 Nat. Bank. Reg. 273; *In re Blodgett v. Sanford*, 10 Id. 147; and in the following authorities it was cited to the point stated: A parol partition of an estate, followed by possession, will be valid, and sufficient to sever the possession, so as to give to each co-tenant the rights and incidents of an exclusive possession of his own property: *Grimes v. Butts*, 65 Ill. 350; *Nichols v. Padfield*, 77 Id. 257; *Hank v. McComas*, 98 Ind. 466; and exclusive possession of one of a particular part of the estate, accompanied by a denial of the co-tenant's right to such part, may create a legal presumption of partition: *Vasey v. Board of Trustees*, 59 Ill. 191; *Nichols v. Padfield*, 77 Id. 257. A court of equity will compel one co-tenant to convey to the other co-tenant, where a parol partition has been had, the legal title of that half of his allotment to which he acquired the equitable title by virtue of the partition: *Buzzell v. Gallagher*, 28 Wis. 681; *Nichols v. Padfield*, 77 Ill. 257.

PAROL PARTITION. — *At Common Law* — *American Cases Holding that Parol Partitions are Invalidated by Statute of Frauds.* — "A partition is voluntary or compulsory. It is voluntary when accomplished by the co-tenants by mutual agreement among each other; and is compulsory when effected by a court having competent jurisdiction for that purpose, acting at the instance of one or more of the co-tenants": Freeman on Cotenancy and Partition, sec. 394. A voluntary partition of lands could be made by parol at the common law between parceners and also between tenants in common: Id., sec. 397; *Lavelle v. Strobel*, 89 Ill. 370. But the following cases hold that the statute of frauds now interposes an insuperable obstacle to a valid parol partition: Freeman on Cotenancy and Partition, sec. 397, and the English authorities there cited; *Porter v. Perkins*, 5 Mass. 233; S. C., 4 Am. Dec. 52; *Dow v. Jewell*, 18 N. H. 340; S. C., 45 Am. Dec. 371; *Ballou v. Hale*, 47 N. H. 347; *Lacy v. Overton*, 2 A. K. Marsh. 440; *Goodhue v. Barnwell*, Rice Eq. 198; *Medlin v. Steele*, 75 N. C. 154; *Wright v. Cane*, 18 La. Ann. 579; *Woodhull v. Longstreet*, 18 N. J. L. 414.

But even under the authorities holding that a parol partition is invalidated by the statute of frauds, it must not be inferred that parol evidence may not, under certain circumstances, be competent to establish a partition. This can only be so, however, when its purport is such as to directly establish that a partition was made in some valid method, the written evidence of which cannot be produced. If a jury be called upon to determine, as an issue of fact, whether or not a partition of lands once held in co-tenancy had been effected, and the undivided estates of the co-tenants thereby changed into estates in severalty, evidence might properly be admitted showing a several occupation of some specified part by each of the co-tenants for a long period of time, and the jury might be justified from such evidence in inferring that a valid partition had been made. But if this long-continued possession in severalty be explained, and be shown to have existed in pursuance of a parol partition made by the co-tenants, the inference which might otherwise be indulged is rebutted, and the jury would not, according to the authorities referred to, be justified in finding that a valid partition had been consummated. The co-tenants would, therefore, notwithstanding their several occupation, be still regarded and treated as owners of undivided moieties: Freeman on Cotenancy and Partition, sec. 397, citing *Porter v. Hill*, 9 Mass. 34; S. C., 6 Am. Dec. 22; *Dow v. Jewell*, 18 N. H. 340; S. C., 45 Am. Dec.

371; *Wright v. Cane*, 18 La. Ann. 579; *Craig v. Taylor*, 6 B. Mon. 459; *Lacy v. Overton*, 2 A. K. Marsh. 446; *Ballou v. Hale*, 47 N. H. 347; *Anders v. Anders*, 2 Dev. 531; *McPherson v. Seguire*, 3 Id. 153; *Richman v. Baldwin*, 21 N. J. L. 395; *Goodhue v. Barnmoell*, Rice Eq. 198; *Medlin v. Steele*, 75 N. C. 154; *Porter v. Perkins*, 5 Mass. 233; S. C., 4 Am. Dec. 52; *Woodhull v. Longstreet*, 18 N. J. L. 414; *Duncan v. Sylvester*, 16 Ma. 390; *Chenery v. Dole*, 39 Id. 162.

Cases Upholding Parol Partitions notwithstanding Statute of Frauds.—On the other hand, as opposed to the above line of cases, the validity of parol partitions, when succeeded by a several possession taken thereunder according to the terms of the partition, has been upheld notwithstanding the statute of frauds: *Calhoun v. Hays*, 8 Watts & S. 127; S. C., 42 Am. Dec. 275; *Hank v. McComas*, 98 Ind. 460; *Buzzell v. Gallagher*, 28 Wis. 678; *Eaton v. Tallmadge*, 24 Id. 217; *Ebert v. Wood*, 1 Binn. 216; S. C., 2 Am. Dec. 436; *Jackson v. Harder*, 4 Johns. 202; S. C., 4 Am. Dec. 262; *Jackson v. Vosburgh*, 9 Johns. 270; S. C., 6 Am. Dec. 276; *Haughabaugh v. Honald*, 3 Brev. 97; S. C., 5 Am. Dec. 548; note to *Lynch v. Baxter*, 51 Am. Dec. 746; *Mount v. Morton*, 20 Barb. 123; *Wood v. Fleet*, 36 N. Y. 499; *Ryers v. Wheeler*, 25 Wend. 434; S. C., 37 Am. Dec. 243; *Jackson v. Christman*, 4 Wend. 277; *Conkling v. Brown*, 57 Barb. 265; *Otis v. Cusack*, 43 Id. 546; *Wilkey v. Bonney's Lessee*, 31 Miss. 644; *City of Natchez v. Vanderveelde*, 31 Id. 706; *Corbin v. Jackson*, 14 Wend. 619; *Pipes v. Buckner*, 51 Miss. 848; *McMahan v. McMahan*, 13 Pa. St. 376; S. C., 53 Am. Dec. 481; *McConnell v. Carey*, 48 Pa. St. 345; *Maul v. Rider*, 51 Id. 377; *Rider v. Maul*, 46 Id. 376; *Manly v. Pettee*, 38 Ill. 128; *Bompart v. Roderman*, 24 Mo. 385; *Le Bourgeoise v. Blank*, 8 Mo. App. 434; *Dement v. Williams*, 44 Tex. 158; *Stuart v. Baker*, 17 Id. 417; *Piatt v. Hubbel*, 5 Ohio, 243; *Hazen v. Barnett*, 50 Mo. 506; *Compton v. Mathews*, 3 La. 143; S. C., 22 Am. Dec. 167; *Lavelle v. Strobel*, 89 Ill. 370; *Moore v. Kerr*, 46 Ind. 468; *Brown v. Wheeler*, 17 Conn. 345; S. C., 44 Am. Dec. 550; *Shepard v. Rinks*, 78 Ill. 188; *Woodbeck v. Wilders*, 18 Cal. 131; *Lauterman v. Williams*, 55 Id. 60; *Hunter v. Morse*, 49 Tex. 219; *Vasey v. Board of Trustees*, 59 Ill. 188. And a parol partition of land is not obnoxious to the Texas statute of frauds, but is valid and binding, and is placed beyond all doubt where the parties have acted upon and acquiesced in such partition, and have never repudiated it. There is a material difference, however, between the statute of frauds of that state and the English statute: *Stuart v. Baker*, 17 Tex. 417; note to *Lynch v. Baxter*, 51 Am. Dec. 746. A verbal partition of land was also binding under the Mexican and Spanish law, where possession was taken: *Lynch v. Baxter*, 4 Tex. 431; S. C., 51 Am. Dec. 735; *Long v. Dollarhide*, 24 Cal. 218; *Elias v. Verdugo*, 27 Id. 419. As to the proprietaries which existed at an early day in the New England states, and under which large tracts of land were acquired and held in undivided interests by grants from the state, it was not necessary that any deed or other written instrument should be executed in order to perfect a partition of their lands, nor that the partition should be consummated by a corresponding possession in severalty. At a meeting of the proprietors, the interest of any one of their number might by a vote be set off to him in severalty. His title to the tract allotted became thereby as perfect as though based upon a conveyance from all his co-proprietors: *Adams v. Frothingham*, 3 Mass. 352; S. C., 3 Am. Dec. 151; *Inhabitants of Springfield v. Miller*, 12 Mass. 415; *Folger v. Mitchell*, 3 Pick. 396; *Corbett v. Norcross*, 35 N. H. 114; *Atkinson v. Bemis*, 11 Id. 47; *Coburn v. Ellenwood*, 4 Id. 99.

But with respect to the law of the present time, as to severalty of possession, etc., laid down in the general rule above, and to which so many

cases are cited, it may be said that a parol partition can be made of land held by an equitable title: *Maul v. Rider*, 51 Pa. St. 377; and that a parol partition valid as between the parties to it may be ratified by the other parties interested: *Dow v. Jewell*, 18 N. H. 340; S. C., 45 Am. Dec. 371. But a parol partition of land not carried into effect by possession taken by either party is not binding on the parties: *Slice v. Derrick*, 2 Rich. 627. It is essential to the validity of such a partition that it shall be fully executed and followed up by a several possession by the parties or their grantees; and it is void if it cannot be followed by such a possession as the law makes essential to its validity: *Lauterman v. Williams*, 55 Cal. 60; *Vasey v. Board of Trustees*, 59 Ill. 188. But it is not necessary that the tenant shall actually enter into possession of the part awarded him; the retention of possession is a sufficient taking possession within the meaning of the law: *Hank v. McCormas*, 98 Ind. 460. A parol partition and subsequent possession will not be sufficient to transfer the title, however, where the whole right or title of the party setting up a tenancy in common and parol partition is denied: *Jackson v. Vosburgh*, 9 Johns. 270; S. C., 6 Am. Dec. 276. A tenancy in common is severed by an agreement between the co-tenants for a partition, followed by occupancy in pursuance of the parol agreement; and each co-tenant is estopped from claiming title to or interfering with the possession of the other: *Pipes v. Buckner*, 51 Miss. 848; *contra* as to estoppel in Missouri: *Bompart v. Roderman*, 24 Mo. 385; and this right to sever the tenancy in common is not affected by the fact that the parol partition relates to two separate and distinct tracts of land not contiguous to each other: *Pipes v. Buckner*, *supra*. A parol partition of lands between tenants in common, if followed up by a several possession, will be good, and will protect the portion allotted to each against a subsequent purchaser or a judgment creditor of the other; but to give a parol partition that effect as to third persons, the several possession of the respective parties must be so open and visible as to notify all persons interested in having such knowledge that a change from a joint to a several possession has occurred: *Manly v. Pettie*, 38 Ill. 128. This case also shows the application of the registry laws where the partition has been by deed, and also the effect of a partition upon liens which have accrued both before and after partition.

Trust Estates — Transfer of Legal Title — Enforcing Parol Partition. — A parol partition of lands held under a resulting trust is valid, because such a trust is not within the statute of frauds: *Dow v. Jewell*, 18 N. H. 340; S. C., 45 Am. Dec. 371. It has been said that in no case has a verbal partition been sufficient for any other purpose than to ascertain the limits of the respective possessions; but Mr. Freeman, in his work on cotenancy and partition, sec. 400, reaches a different conclusion, and the correct one, we conceive, as evidenced by the cases, and says: "In those decisions which affirm the validity of parol partitions, the whole tenor of the opinion of the courts, with one or two exceptions, is to the effect that such partitions invest each co-tenant with a full, perfect, legal title to the property allotted to him, and of which, by virtue of such allotment, he has taken and held possession. If he is so invested with the legal title, no impediment exists to prevent his maintaining ejectment against any person unlawfully in possession." On this question, see *Jackson v. Vosburgh*, 9 Johns. 270; S. C., 6 Am. Dec. 276; *Corbin v. Jackson*, 14 Wend. 625; S. C., 28 Am. Dec. 550; *Jackson v. Livingston*, 7 Wend. 140, 141; *Bompart v. Roderman*, 24 Mo. 400. But the Missouri decision just cited, so far as it implies that a parol partition affects the legal title, has since been doubted: *Le Bourgeoise v. Blank*, 8 Mo. App.

435; and in *Hazen v. Barnett*, 50 Mo. 506, it was held that the equitable title only passed. It seems to be assumed in the principal case (*Buzzell v. Gallagher*, 28 Wis. 678, *Gates v. Salmon*, 46 Cal. 362), that a parol partition does not affect the legal title. But whatever effect may be conceded at law to parol partitions, it is quite certain that, when executed by the taking of a several possession thereunder according to the terms of the partition, they will be recognized and enforced in equity, particularly when such a partition and the possession based upon it have been mutually acquiesced in by the parties for a considerable length of time: See principal case; *Buzzell v. Gallagher*, 28 Wis. 678, approving and following *Eaton v. Tallmadge*, 24 Id. 217; *Hasen v. Barnett*, 50 Mo. 506; *Goodhue v. Barnwell*, Rice Eq. 198, 236; *Massey v. McIlwain*, 2 Hill Ch. 426; *Pope v. Henry*, 24 Vt. 560; *Kennedy v. Kennedy*, 43 Pa. St. 413; *Dawson v. Lawrence*, 13 Ohio, 543; S. C., 42 Am. Dec. 210.

Conveyances, Mutual and to Strangers — Presumption as to Voluntary Partition. — In those decisions which affirm the validity of parol partitions, the tenor of opinion of the courts seems to be that, in effecting such partitions, deeds of partition are not necessary, though to give them would, perhaps, be the better practice: *Coles v. Wooding*, 2 Pat. & H. 189. A failure to execute them, however, will not affect the rights of the parties: *Pipes v. Buckner*, 51 Miss. 848. In this country, the most common mode of effecting partition by conveyances is for each co-tenant to take a conveyance from all the others, of the lands which have been previously agreed upon as his purparty; and whether deeds are necessary or not, when the partition is effected by mutual deeds between the co-tenants, all these deeds must be taken and construed together as one instrument, in the light of all the surrounding circumstances to which they obviously and directly point: *Freeman on Co-tenancy and Partition*, sec. 406; *Rountree v. Denson*, 59 Wis. 522; S. C., 18 N. W. Rep. 513; *Norris v. Hill*, 1 Mich. 202; *Weeks v. Haas*, 3 Watts & S. 520; S. C., 39 Am. Dec. 39; *Dawson v. Lawrence*, 13 Ohio, 543; S. C., 42 Am. Dec. 210; *Staples v. Bradley*, 23 Conn. 167; S. C., 60 Am. Dec. 630. In Wisconsin, it has been held that two co-tenants may produce a partition of their lands by virtue of separate conveyances made by them to third persons: *Eaton v. Tallmadge*, 24 Wis. 217; but in Maine, in a case where two co-tenants made a parol partition, took and held possession thereunder many years, and each conveyed his purparty to a stranger to the co-tenancy, it was held that neither co-tenant could invest the other with a separate title to a portion of the tract without the formality of a deed; and that each could, therefore, avoid the conveyance of the other, and enforce a partition of the property: *Duncan v. Sylvester*, 16 Me. 388. Whether a voluntary partition is capable of being consummated by virtue of possession taken in pursuance of a parol agreement for the division of lands, or whether it is inchoate until confirmed by conveyances duly executed in pursuance thereof, it may in either case be occasionally established by parol evidence, which, though not directly proving the partition, may be of such a character as to produce the conviction that a partition has been made. Thus, if the co-tenants had for a long period of time each occupied a distinct part of the lands of the co-tenancy, apparently exercising the rights of sole ownership, and being recognized by his companions in interest as entitled to possession in severalty, these facts might properly be submitted to a jury as evidence tending to prove an antecedent partition, and the jury would be justified in finding either way, according to the impression which the evidence happened to produce on their minds: See principal case; *Adie v. Cornwall*, 3 T. B. Mon. 283; *Vasey v.*

Board of Trustees, 59 Ill. 188; *Gillespie v. Johnston*, Wright, 231; *Livingston v. Ketcham*, 1 Barb. 592; *Walker v. Frazier*, 2 Rich. Eq. 111; *Jackson v. Miller*, 6 Wend. 228; S. C., 21 Am. Dec. 316; *Slade v. Green*, Tayl. 111; *Campbell v. Wallace*, 12 N. H. 362; S. C., 37 Am. Dec. 219; *Booth v. Adams*, 11 Vt. 156; S. C., 34 Am. Dec. 680; *Pope v. Henry*, 24 Vt. 560. A partition may be established by circumstantial evidence: *Markos v. Wakeman*, 107 Ill. 251. But where the evidence of a separate possession is slight and vague, there can be no presumption in favor of a parol partition: *Haughabaugh v. Honald*, 3 Brev. 97; S. C., 5 Am. Dec. 548. After acquiescence in a parol partition of lands for a great period of time without any question of its validity, it will be presumed, if necessary to sustain the same, that proper partition deeds were executed by the parties in interest: *Lavelle v. Strobel*, 89 Ill. 370; *Jackson v. Christman*, 4 Wend. 277.

Warranty, whether It Arises from Voluntary Partition. — With respect to this question, a distinction must be made between voluntary and compulsory partitions. In a voluntary partition, it has been held that the law would no more imply a warranty than in a conveyance between any other vendor and vendee; but that in a compulsory partition, as between parceners, the law will imply a warranty: *Picot v. Page*, 26 Mo. 422; *Rector v. Waugh*, 17 Id. 13; S. C., 57 Am. Dec. 251; *Weiser v. Weiser*, 5 Watts, 279; S. C., 30 Am. Dec. 313; *Morris v. Harris*, 9 Gill, 19. A voluntary partition of the interests of several persons in lands, without warranty, will, as between such persons, only give to each one the rights and interest, either vested or contingent, which he and the others then have in the lands set off in severalty: *Carpenter v. Schermerhorn*, 2 Barb. Ch. 314. And in Vermont it is held that where co-tenants divide land by giving quitclaim deeds to each other of a portion thereof, if the title to the part conveyed to either afterwards fails, he must, in the absence of any fraud on the part of the other, bear the loss himself: *Beardsley v. Knight*, 10 Vt. 185; S. C., 33 Am. Dec. 193. The right of each grantee "to recompense in case of loss depends solely upon the covenants contained in the deed, and not upon any implied warranty": *Rountree v. Denson*, 59 Wis. 522; S. C., 18 N. W. Rep. 518. But other cases ignore the distinction mentioned as existing between voluntary and compulsory partitions, and at least concede to the former such an implied warranty as will estop each of the co-tenants from denying the validity of the common title: *Rogers v. Turley*, 4 Bibb, 356; *Venable v. Beauchamp*, 3 Dana, 321; S. C., 28 Am. Dec. 74; *Tewksbury v. Provizzo*, 12 Cal. 21; *Patterson v. Lanning*, 10 Watts, 135; S. C., 36 Am. Dec. 154; *Feather v. Strohoecker*, 3 Penr. & W. 505; S. C., 24 Am. Dec. 342.

Effect of Parol Partition on Females Covert, and on Wife's Right to Dower — Voluntary Partition between Husband and Wife. — A parol partition, if fair and equal, and executed by corresponding possession, is good, though some of the tenants be under coverture, and others of them elect to hold their purparts, as before, by community of possession: *McMahan v. McMahan*, 13 Pa. St. 376; S. C., 53 Am. Dec. 481; and the mere coverture of one of the parties to an agreement for partition of real estate is not sufficient to invalidate it, where such agreement was made in the presence of her husband, assented to by him, consummated by an actual division, and possession taken and held according to it for fourteen years: *Hardy v. Summers*, 10 Gill & J. 316; S. C., 32 Am. Dec. 167; *Calhoun v. Hays*, 8 Watts & S. 127; S. C., 42 Am. Dec. 275. A *feme covert*, however, has no power over her separate estate but what is given to her by the conveyance creating it, and then only in the manner and form and for the objects therein prescribed: *Wetherill v. Mecke*, Bright. N. P.

135. In Virginia, where parties owned a tract of land jointly, and afterwards married, and made subsequently a deed of partition of the same, and held it in severalty afterwards, the partition so made was held binding on the parties, even though no certificate of privy examination of the wife appeared in the deed: *Bryan v. Stump*, 8 Gratt. 241; S. C., 56 Am. Dec. 139. So under a statute of Indiana, a wife holding lands by virtue of any prior marriage was rendered incompetent to convey it, whether with or without the assent of her husband. This statute was held not to invalidate her deed of partition, because the wife could be compelled to make partition, and therefore ought to be allowed to do so voluntarily, and because the partition was not a conveyance of land, but a mere allotment to each of the owners in severalty of the same interest which he or she before held in common: *Bumgardner v. Edwards*, 85 Ind. 117. Whenever the husband perfects a voluntary partition, the dower interest of his wife is thereby removed from the purparty of the husband's other co-tenants, and confined to the purparty of the husband: *Potter v. Wheeler*, 13 Mass. 504; *Lloyd v. Conover*, 25 N. J. L. 47; *Wilkinson v. Parish*, 3 Paige, 658; *Lee v. Lindell*, 22 Mo. 203; S. C., 64 Am. Dec. 262; *Jackson v. Edwards*, 22 Wend. 512. *Femes covert* seeking to assert dower rights will be restricted, both at law and in equity, to the allotments of their husbands, and will be estopped from seeking to have dower assigned on undivided shares of other parcels. By confining them to the equal shares which their husbands take in the partition, they have all the dower the law gives them: *Totten v. Stuyvesant*, 3 Edw. Ch. 503. But whenever the husband exercises his power of making voluntary partition for the purpose of destroying the wife's rights, or of accomplishing a fraud upon her, he is not acting as the law would compel him to act, and the reason for holding the wife bound by his partition fails: *Potter v. Wheeler*, 13 Mass. 506; *Mosher v. Mosher*, 32 Me. 412. It seems that the right of a husband by a voluntary partition to prescribe limits to the wife's inchoate right of dower does not vest in his grantee: *Rank v. Hanna*, 6 Ind. 20. In Viner's Abridgement, tit. Partition, D, subd. 13, it is stated that "partition between husband and wife of lands, if it be equal, shall bind the makers, because they are compellable to make partition"; but in Missouri it is held that the husband and wife cannot release to each other their respective interests in land by deed of partition, because the legal unity of husband and wife prevents it: *Frissell v. Rosier*, 19 Mo. 448. Mr. Freeman thinks that a husband and wife desirous of partitioning lands of which they are co-tenants can do so by jointly conveying the lands to a third person, and procuring him to reconvey a distinct parcel to each to hold in severalty: Freeman on Cotenancy and Partition, sec. 413.

Infancy — Effect of Voluntary Partitions on Lien-holders. — The general rule is, that voluntary partitions made by or on behalf of infants will be treated as valid and binding, if they were, when made, equal and fair and untainted by fraud. In *Townsend v. Estate of Downer*, 32 Vt. 183, it is held that the fact that infants and married women own proprietary rights in townships does not prevent their being bound by the acts of the proprietors in making divisions at legal meetings, or by subsequent acquiescence in such a division. A parol partition done by agreement of the parties, without legal process, if fair and equal, will be good and binding upon all, whether *femes covert* or not if their husbands join, or minors if with the consent of their guardians: *Calhoun v. Hays*, 8 Watts & S. 127; S. C., 42 Am. Dec. 275, 281. And a fair parol partition, followed by a judicial sale of the entirety of one tenant in common, after division, and a proper application of the money, would sever the possession, although the owners of one moiety were minors: *Willard v.*

Willard, 56 Pa. St. 119. Where any person, even an infant, does that which by law he is compelled to do, he is bound: *Id.* But a minor to whom a tract of land has been devised is not bound by a partition made by other devisees of the same testator of land devised to them, and of his land, by which a portion of both tracts is set off to him, although upon attaining majority he exercised acts of ownership over the part so set off to him: *Hemmich v. High*, 2 Watts, 159; S. C., 27 Am. Dec. 295. In a case decided in New Brunswick, A, B, and C were tenants in common. In 1810, while A was a minor, her father, acting in her behalf, made partition with B and C. Four years later, but before attaining her majority, A married. Thereafter her husband occupied the portion allotted to her until his death in 1842. In 1848 she sought to avoid the partition. Whereupon it was held that she had a reasonable time after the removal of her disability of coverture to object to the partition; but that six years was such an unreasonable delay as estopped her from making an objection which she might have made at once upon the decease of her husband: *Doe ex dem. Estabrooks v. Harris*, 2 Allen (N. B.), 42. Where the moiety of one of the co-tenants is subject to a judgment, mortgage, or other lien, it seems that an equal and honest parol partition will bind the lien-holder, and convert his lien from a charge against an undivided moiety of the whole to a charge against the whole of the tract which has been taken in lieu of the moiety: *Bavington v. Clarke*, 2 Pennr. & W. 115; S. C., 21 Am. Dec. 432; *Manly v. Pettie*, 38 Ill. 128; *Long's Appeal*, 77 Pa. St. 151; *contra*, *Emson v. Polhemus*, 28 N. J. Eq. 439, where the subject is thoroughly considered. Compare *Staples v. Bradley*, 23 Conn. 167; S. C., 60 Am. Dec. 690.

Power Delegating Authority to Make Partition—Agreement for Partition.—It has been decided that a power of attorney to sell and convey any portion or all of the principal's real estate, and generally to do, transact, determine, and accomplish all matters, etc., although the matters should require more special authority than were comprised in the power, does not authorize the attorney to make partition of lands in which his constituent is a tenant in common: *Borel v. Rollins*, 30 Cal. 409. On the other hand, however, there are late decisions of high authority holding that a power to sell and exchange, *Phelps v. Harris*, 101 U. S. 370, *In re Frith*, L. R. 3 Ch. Div. 618, or a power to dispose of and invest the proceeds, is sufficient to support a partition made under it: *Phelps v. Harris*, 101 U. S. 370. Notwithstanding the statute of frauds, it has always been conceded that an agreement in writing to make partition will have the same effect in equity as an actual partition at law, though it might not be good at law: 2 Cruise, 410; Co. Lit. 169 a; *Masterson v. Finnigan*, 2 R. I. 316; *Metcalf v. Alter*, 31 La. Ann. 389. Equity will adopt, and if necessary enforce, an agreement for partition entered into by the respective co-tenants: *Norwood v. Norwood*, 4 Har. & J. 112; *Pringle v. Sturgeon*, Litt. Sel. Cas. 112; and will not disregard it because of trifling mistakes or inequalities: *Fleming v. Kerr*, 10 Watts, 444. A deed or agreement to divide lands which for any reason is void as to one is void as to all. And the same rule applies where some of the parties fail to execute: *Teaksbury v. O'Connell*, 21 Cal. 61; *Gates v. Salmon*, 46 Id. 362; *Morris v. Richardson*, 11 Humph. 389; *Douglass v. Harrison*, 2 Sneed, 393; *Emeric v. Alvarado*, 64 Cal. 529; S. C., 1 W. C. Rep. 708. A contract for partition must bind all the tenants in common or it binds none: *Gates v. Salmon*, 46 Cal. 362. And either party may rescind an agreement for parol partition until it is executed; it is not binding until then: *Woodbeck v. Wilders*, 18 Id. 131. Such an agreement is void if it is of such a character that it can-

not be followed by a legal several possession: *Laxterman v. Williams*, 55 Id. 60. Before the statute of frauds, a partition of lands made by verbal agreement was binding, if followed by livery of seisin, and an agreement in writing to make partition had the same effect as an actual partition at law: *Lavelle v. Strobel*, 89 Ill. 370.

Other Matters. — A parol partition may be set up and relied on as a defense, though no deeds were ever executed in pursuance thereof: *Nichols v. Padfield*, 77 Ill. 253; *Grimes v. Butts*, 65 Id. 347. A several possession by each co-tenant, following a parol partition, constitutes notice as to third parties of unrecorded deeds which the co-tenants have interchanged: *Manly v. Pettee*, 38 Id. 128; and where the co-tenants have made warranty deeds to each other, and they have been recorded, it will afford constructive notice to a person subsequently purchasing of either an interest in the part conveyed by the other, sufficient to put him on inquiry as to the fact that a partition had been made by the tenants in common before their several conveyances: *Markoe v. Wakemam*, 107 Id. 251.

BATY v. SALE.

[43 ILLINOIS, 351.]

INDIVIDUALS RELY FOR PROTECTION OF THEIR RIGHTS ON LAW, and not upon regulations and proclamations of the departments of government, or officers who have been designated to carry the laws into effect.

PRE-EMPTION RIGHTS AND BENEFITS MAY BE ACQUIRED BY COMPLIANCE WITH REQUIREMENTS OF PRE-EMPTION LAW, and any other conditions or requirements superadded by the commissioners of the general land-office cannot affect one's rights under that law.

PRE-EMPTION ACT DOES NOT REQUIRE APPLICATION FOR LANDS TO BE RENEWED, where they have been withdrawn from market for a short period after a claim for a pre-emption has once been filed; and such a requirement imposed by the officers of the land-office amounts to nothing. They are powerless to annex conditions or provisions to the law; that can only be done by the law-making power.

PRE-EMPTOR HAS ONE ENTIRE YEAR, WHILE LAND IS SUBJECT TO ENTRY, WITHIN WHICH TO MAKE HIS FINAL PROOF and to complete his purchase, under the act of September 4, 1841, sec. 15, 5 U. S. Statutes at Large, p. 457.

SAME — TIME, HOW COMPUTED, WHERE LANDS HAVE BEEN WITHDRAWN FROM MARKET FOR SHORT PERIOD. — Where land is temporarily withdrawn from the market, after a party has filed his declaration of an intention to pre-empt it, the officers of the land-office may properly exclude the time that the land is not subject to entry, in computing the year within which he has the right to make his proof and enter the land.

THE facts are stated in the opinion.

Wood and Long, for the appellants.

E. S. Terry, for the appellee.

By Court, WALKER, C. J. It appears from the record in this case that Peter Baty, in his lifetime, and about the sixth day

of November, 1855, erected a building on the southwest quarter of section 17, in township 23 north, of range 9 east, situate in Ford County, and moved into it and resided thereon until his death. About the 15th of the same month he filed an application for a pre-emption on this land. Afterward, on the eleventh day of December, 1856, he proved his pre-emption, which was allowed, and entered the land with a bounty land warrant and received a certificate of purchase. This entry was subsequently brought before the commissioner of the general land-office, who decided that the pre-emption had been proved and the entry properly made.

Appellee, subsequently to the filing of the application to pre-empt the land by Baty, on the 29th of November, 1855, and while Baty was still in possession, entered the land, and he also received a certificate of purchase. Afterward a patent issued to him on this entry. This led to a contest before the commissioner of the general land-office as to which was the legal entry. The patent to appellee and the certificate of entry were recalled, and on a hearing, the commissioner decided that the land having been temporarily withdrawn from the market after Baty filed his declaration of an intention to pre-empt it, he should have renewed his application; and that his entry was therefore irregular and void, and delivered the patent to appellee. He subsequently brought an action of ejectment to recover the possession of the land, and Baty filed this bill to enjoin the action of ejectment to have appellee's patent canceled, and for general relief. The case was heard in the court below on the bill, answer, replication, exhibits, and proofs, where the bill was dismissed. Baty having died before the hearing, the suit was revived in the name of the heirs, who prosecute this appeal, and ask a reversal of the decree of the court below.

It is not contested that the land was subject to pre-emption at the time Baty filed his application to be permitted to enter the land by pre-emption in the land-office at Danville, on the 15th of November, 1855. The commissioner of the general land-office, on the fifth day of May, 1856, issued a proclamation giving notice that the office at Danville was discontinued, and that unsold lands in the district would be subject to entry at Springfield, after the officers at the latter place should give notice thereof. It is insisted that this discontinuance of the office at Danville, and thus taking their land out of market during the period which intervened the proclamation

and the notice that the land was subject to entry, rendered the renewal of the application for pre-emption necessary to confer that right, and gave to appellee's entry the preference.

We do not perceive how a regulation of the general land-office, in the absence of some statute requiring such a renewal, could produce such a result. Individuals rely for the protection of their rights on the law, and not upon regulations and proclamations of the departments of government, or officers who have been designated to carry the laws into effect. The act providing for pre-emptions does not declare that when lands are withdrawn from market for a short period after a claim for a pre-emption has been filed the application shall be renewed. And the officers of the land-office are powerless to annex conditions or provisions to the law. That can only be done by the law-making power. When, therefore, Baty filed his application under the act of 1841, he had an exclusive right to enter this land by conforming to the provisions of that law, and any other conditions superadded by the commissioner of the general land-office could not affect his rights.

The pre-emption in this case is claimed under the fifteenth section of the act of the 4th of September, 1841; and it declares that when any person settles and improves a tract of land, subject at the time to private entry, shall file his declaration of intention within thirty days thereafter, and shall, within twelve months after the date of such settlement make proof and payment as therein required, he may thus become the purchaser; and if such person shall fail to make proof and payment within that time, the land shall be subject to the entry of any other person.

To avail himself of the benefits of the pre-emption laws, a person must comply with the conditions they impose. It is a favor bestowed only on the terms prescribed by the statute.

It appears from the record in this case that the land-office at Danville was closed on the 5th of May, 1866, orders having been received to remove the books, papers, and other fixtures of the office to Springfield, where land lying in that district should become subject to entry after proper notice should be given. We also see that on the eleventh day of December of that year Baty made the final proof, and was permitted to enter the land. The record fails to disclose what length of time intervened after the closing of the office at Danville before lands in the Danville district became subject to entry at Springfield; but we may safely infer that the officers did not

compute any portion of the time this land was withdrawn from the market as a part of the year within which Baty had the right to make his proof and enter the land.

While the law in terms fails to indicate the mode in which the time must be computed, it is manifest that it was the intention to give the pre-emptor an entire year, while the land was subject to entry, within which to make his final proof and to complete his purchase.

Unless such a construction be placed upon the law, the pre-emptor is liable to lose his labor, improvements, and expenditures made upon the land with not only the permission of the government, but with the assurance that he should have a year within which to pay for and receive a title to the land. If a different construction was to prevail, Baty, in this case, would be limited to perhaps no more than six months to complete his entry, as, after the Danville office closed in May, the land may not have again been placed in market till after the expiration of the year after he filed his declaration of an intention to pre-empt this land. Such, we think, was not the legislative intention, but, on the contrary, that the pre-emptor should have full twelve months while the land could be entered to make payment and receive his certificate of purchase. The officers did right, then, in excluding the time the land was not subject to entry, as we presume they did when they permitted Baty to make his entry under the act allowing pre-emptions.

The entry was made in this case only some twenty-six days after the year had expired, and we presume the land was out of market for that or a longer period, or the officers would not have permitted the entry to be made. Such being the case, we think the entry by Baty was legally made.

In the case of *Clements v. Warner*, 24 How. 394, the supreme court, in a case similarly situated, held such an entry valid. And although this question was not discussed by the court, still the entry by the pre-emptor in that case was made as in this. By the opinion of the court, it appears that the pre-emption in that case was begun more than one year prior to the time when the entry was made; and in that case, as in this, the land was sold to a different person the next month after the pre-emptor had commenced his settlement. Yet the court held that the pre-emptor was entitled to hold the land, although he paid his money and received his certificate subsequent to the other entry. It must therefore be held, in this

case, that Baty's entry related back to his settlement and the filing of his declaration of intention to pre-empt the land. It thus became appropriated and was taken out of the market, and was so when appellee made his entry, and hence it was wholly unauthorized, and in no respect affected Baty's right to the land. And his children, by his death, succeeded to all of his rights. They are therefore entitled, on the proof in this case, to the relief sought by the bill; and the decree of the court below must be reversed, and the cause remanded.

Decree reversed.

CONCLUSIVENESS OF DECISIONS OF LAND-OFFICERS: *Brill v. Stiles*, 85 Am. Dec. 364, and note 367; note to *Rogers v. Brent*, 50 Id. 434; note to *Guidry v. Woods*, 36 Id. 681. Delay of officers, by which pre-emption applicant is prevented from obtaining his certificate of pre-emption within the time limited, will not defeat his right, but the certificate may be granted to him after the expiration of the time so limited by law: *Perry v. O'Hanlon*, 49 Id. 100.

WITH RESPECT TO CONCLUSIVENESS OF DECISIONS OF UNITED STATES LAND-OFFICERS, there are two classes of authorities, and a clear and sound distinction exists between them. In one class the proceedings of the land-officers are held conclusive, because judicial in their character, and within their conceded jurisdiction. In the other, such proceedings are held not conclusive, because they are either ministerial in their character, and unauthorized, as in the principal case; or, if judicial, beyond the authority given by the acts of Congress. Thus, under the pre-emption laws passed by Congress, the land-officers have, by implication, the right to decide all cases of contested pre-emption, so far as they depend upon the fact of prior settlement, and their finding in that regard has been held conclusive by the courts, on the ground that such officers in these proceedings act in a *quasi* judicial capacity, and within the scope of their authority. And the land-officers having the power to adjudicate upon the facts which give a pre-emption right, they have the power when the right is contested by a person claiming under a private entry as well as when both claim under pre-emptions. On the other hand, however, when such officers have undertaken to cancel a patent or a certificate of entry for which a purchaser has paid his money, either at their discretion or under some pretended regulation of the department which the law did not authorize, or under some clearly erroneous construction of the laws of Congress, the courts have held themselves not bound by such acts of the officers of the land department, because they were not exercising a judicial function within the limits prescribed by law: *Robbins v. Bunn*, 54 Ill. 51, 52, citing the principal case.

CHICAGO AND ALTON R. R. Co. v. FLAGG.

[43 ILLINOIS, 364.]

IF RAILROAD COMPANY REGULARLY CARRIES PASSENGERS BY FREIGHT TRAIN, and holds itself out to the public as so doing, it thereby becomes a common carrier of passengers by such freight train, and has no more right to expel a passenger therefrom without cause than from a regular passenger train.

RAILROAD COMPANY HAS POWER TO MAKE ALL REASONABLE RULES FOR GOVERNMENT OF ITS TRAINS; and may, as to certain classes of trains, require tickets to be purchased before allowing passage to be taken thereon.

PASSENGER MAY BE EXPELLED AT ANY REGULAR STATION, BUT ONLY AT SUCH STATION, where he has knowingly disregarded the rule requiring tickets to be purchased before taking passage on a railroad train. His willful neglect to comply with the rules in this particular would be like a refusal to pay the fare, and could place the passenger in no worse position.

WHEN RAILROAD COMPANY REQUIRES TICKETS TO BE PURCHASED AT STATION, FACILITIES MUST BE FURNISHED to the public by keeping open the ticket-office a reasonable time prior to the hour fixed by the timetable for the departure of its trains.

FAILURE OF RAILROAD COMPANY TO GIVE REASONABLE OPPORTUNITY FOR PURCHASE OF TICKET, by one who desires to take passage on one of its trains, gives such person a right to enter and be carried to his place of destination on payment of the regular fare to the conductor; and his expulsion, under such circumstances, would be unlawful.

PASSENGER CANNOT BE EXPELLED AT PLACE OTHER THAN REGULAR STATION, even where he has willfully neglected to purchase a ticket as required before entering the train.

"REGULAR STATION" MEANS USUAL STOPPING-PLACE FOR DISCHARGE OF PASSENGERS.

WATER-TANK, EVEN IF "USUAL STOPPING-PLACE FOR TRAINS," IS NOT "REGULAR STATION," within the spirit of the law.

"REGULAR STATION" CANNOT BE CREATED BY LOCAL USAGE; thus a local usage adopted by persons of getting on or off a train, for their own convenience, at a place other than the regular station, does not make such place a "regular station" for the discharge of passengers.

PASSENGER WRONGFULLY EXPELLED FROM RAILROAD TRAIN MAY RECOVER MORE THAN NOMINAL DAMAGES, even though he has received no personal injuries to his body by reason of such expulsion, and has suffered no pecuniary loss.

ELEMENTS OF DAMAGE FOR WRONGFUL EXPULSION FROM RAILROAD TRAIN. The jury, in estimating the damages, may consider not only the annoyance, vexation, delay, and risk to which the person was subjected, but also the indignity done to him by the mere fact of expulsion; and this, although the proof shows that the conductor acted in good faith, without violence or insult, and that no actual damage was sustained.

PHRASE "USUAL STOPPING-PLACE," IN STATUTE CONCERNING RAILROAD LAW, MEANS a regular station for passengers to get on and off the train.

The facts are stated in the opinion.

Williams and Burr, for the appellant.

J. McNulta and W. H. Hanna, for the appellee.

By Court, LAWRENCE, J. This was an action on the case brought by the appellee against the railway company for wrongfully expelling him from one of its trains. Being desirous of traveling a short distance on the road, he entered what is called the caboose-car, attached to a freight train, without a ticket. From the conversation which subsequently took place between him and the conductor, as drawn out by the defendant's counsel on the cross-examination of a witness, it appears he was unable to procure a ticket because the ticket-office was closed. When his ticket was demanded on the train, he offered to pay his fare, and also offered to give the conductor ten dollars to be kept by him until a ticket could be procured at the next station.

The conductor replied that he was forbidden by the rules of the road to receive money for fares, and should he do so he might lose his place. The train stopped at a water-tank about a quarter of a mile from a station called Lanndale, and the conductor there required the plaintiff to leave the train. No resistance was made by him, and no violence or insult offered by the conductor. The jury gave the plaintiff a verdict of one hundred dollars, for which the court rendered judgment.

It appears from the record that, although this was a freight train, yet it regularly carried passengers, and was held out to the public as so doing. The company itself put in evidence a printed notice, with certain regulations in regard to the carriage of passengers on freight trains, and forbidding conductors to carry them unless provided with tickets in advance. It was therefore a common carrier of passengers by this train as well as by its regular passenger trains, and would have no more right to expel a traveler wantonly and without cause from one train than from the other.

It is urged that the company must have the power to make reasonable rules for the government of its trains. Undoubtedly; and if a company deem it advisable to require tickets to be purchased before taking passage on certain classes of trains, its authority to do so must be conceded. If its rules in this respect are knowingly disregarded, a passenger may be required to leave the train at any regular station, but only at such stations, as decided in *Chicago etc. R. R. Co. v. Parks*, 18 Ill. 465 [68 Am. Dec. 562]. The willful neglect to comply with

the rules in this matter would be like a refusal to pay the fare, and could place the passenger in no worse position. But when the company requires tickets to be purchased at the station, it must furnish convenient facilities to the public by keeping open the office a reasonable time in advance of the hour fixed by the time-table for the departure of the train. Should it fail to do this, a person desiring to take passage would have the right to enter the train and be carried to his place of destination by payment of the regular fare to the conductor. To permit a company to complain of a violation of its own rules necessitated by the negligence of its own agents would be absurd. If, then, as is fairly inferable from the evidence, the plaintiff was prevented from buying a ticket by the absence of the ticket agent, he was rightfully on the train, and his expulsion was unlawful.

But even if wrongfully on the train from willful non-compliance with this rule, he was expelled at a place which, under the statute, rendered the expulsion itself illegal. It is urged that a water-tank, if a "usual stopping-place," is within the letter of the law. It is within the letter, but so obviously without its spirit that to permit a passenger to be expelled at a water-tank often miles from a station, and remote from highways and habitations, would defeat the object of the law, and be a striking instance of "sticking in the bark." As has been several times said by this court, the statute means the usual stopping-places for the discharge of passengers.

It is in proof that passengers desiring to enter or leave the train at the Lanndale station, often did so at this water-tank, as the freight train frequently passed the station itself without stopping, and the tank was only a quarter of a mile distant. It is also in proof that passengers left at the station when the train stopped there. Whether this tank was the usual place for the discharge of passengers from freight trains, was distinctly left to the jury by the sixth instruction for the defendant, and they found it was not. Their finding was undoubtedly right. A local usage adopted by persons living in the neighborhood, and familiar with the ground, for their own convenience, cannot be considered as making any place but a regular station the proper point for the discharge of passengers.

It is also urged that, as the conductor acted in good faith, and without violence or insult, and there is no proof of actual

damage to the plaintiff, the verdict should have been for only nominal damages. The verdict was for one hundred dollars. It was after dark when this affair occurred, and the plaintiff was lame, and had two bundles that seemed to be heavy. In order to reach the station or village, he had to pass over a covered railway bridge which spanned a stream, and which he had to cross by means of a plank walk or foot-path, about three feet wide, laid down upon the timbers. The only light came from below and from the ends of the bridge. For a stranger laden with bundles to be compelled to walk through a dark railway bridge at night on a narrow path, uncertain as to when a train may come, and liable to be crushed if one does come, is certainly not a desirable experience. The jury had the right to take these things into consideration, and as the plaintiff himself had been guilty of no delinquency and was anxious to pay his fare, and as his legal rights were violated in expelling him from the train, it was proper for the jury also to consider, not only the annoyance, vexation, delay, and risk to which he was subjected, but also the indignity done to him by the mere fact of expulsion. This case is widely different from that of *Chicago etc. R. R. Co. v. Roberts*, 40 Ill. 503. We cannot say the damages were excessive.

It is urged that the court erred in refusing the defendant's seventh instruction, which was, in substance, that even if the plaintiff was wrongfully put off the train, yet if the conductor acted in good faith and without violence, the jury could give only such actual damages as the plaintiff sustained, or if he sustained none, then only nominal damages. It is unnecessary to add to what we have already said on this subject. In a case of this character, where the plaintiff was without fault, the jury had a right to give more than nominal damages, even though no pecuniary loss or actual injury to the plaintiff's person was proven. The considerations above named may properly enter into the verdict in a reasonable degree. Neither did the court err in modifying the other instructions, by adding that the phrase "usual stopping-place" means in the statute a regular station for passengers to get on and off the train. That is what it does mean: *Chicago etc. R. R. Co. v. Parks*, 18 Ill. 465 [68 Am. Dec. 562]; *Terre Haute etc. R. R. Co. v. Vanatta*, 21 Id. 188 [74 Am. Dec. 96].

The judgment must be affirmed.

Judgment affirmed.

RULES AS TO CARRYING PASSENGERS ON FREIGHT TRAINS: See extended note to *Commonwealth v. Power*, 41 Am. Dec. 478; and construction trains: *Ohio etc. R. R. Co. v. Muehling*, 81 Id. 336.

REASONABLE RULES AND REGULATIONS WHICH RAILROAD COMPANIES MAY MAKE AS TO PASSENGERS AND OTHERS NOT EMPLOYEES: See extended note to *Commonwealth v. Power*, 41 Am. Dec. 471-486, thoroughly discussing the whole subject: *State v. Overton*, 61 Id. 671; *Day v. Owen*, 72 Id. 62; *Johnson v. Concord R. R. Corp.*, 88 Id. 199.

PASSENGER MAY BE EXPELLED FROM REGULAR STATION, BUT NOT ELSEWHERE, FOR REFUSAL TO PAY FARE, or neglect to purchase ticket where he had a reasonable opportunity to do so: See *Illinois Cent. R. R. Co. v. Whittemore*, post, p. 138; *Chicago etc. R. R. Co. v. Parks*, 68 Am. Dec. 562, and extended note thereto 570-573, on expulsion of passengers, when, where, and how it may be exercised; extended note to *Commonwealth v. Power*, 41 Id. 476, 477; *Terre Haute etc. R. R. v. Vanatta*, 74 Id. 96.

RAILROAD COMPANY MUST FURNISH FACILITIES FOR PURCHASE OF TICKETS where it requires them to be bought before one can take passage on its trains: See *St. Louis etc. R. R. Co. v. South*, ante, p. 103.

"USUAL STOPPING-PLACE" MEANS REGULAR STATION at which passengers get on and off a train: See note to *Terre Haute etc. R. R. v. Vanatta*, 74 Am. Dec. 98.

VERDICT OF ONE THOUSAND DOLLARS FOR PUTTING PASSENGER OFF RAILROAD TRAIN IS EXCESSIVE, and should be set aside, where there is no evidence of special damage: See note to *Terre Haute etc. R. R. v. Vanatta*, 74 Am. Dec. 98.

THE PRINCIPAL CASE WAS CITED in each of the following authorities, and to the point stated: Where a railroad company requires tickets to be purchased at the station, it must furnish convenient facilities to the public by keeping open the office a reasonable time in advance of the hour fixed by the time-table for the departure of the train. Should it fail to do this, a person desiring to take passage would have the right to enter the car and be carried to his place of destination on payment of the regular fare to the conductor: *Illinois Cent. R. R. Co. v. Johnson*, 67 Ill. 314; *Chicago etc. R. R. Co. v. Griffin*, 68 Id. 507. Where the company undertakes to do its business by means of tickets, whether it requires, as it may, the possession of a ticket as a prerequisite to entering its cars, or whether it offers a deduction from the regular or advertised rate to one who shall procure a ticket in advance, it is a part of its duty to afford a reasonable opportunity to obtain its tickets: *Swan v. Manchester etc. R. R.*, 132 Mass. 118. A railroad company is not bound as a public duty to receive and carry passengers in the cabooses of a freight train, but if it does so receive and undertake to carry them, it will be bound by all the obligations of a common carrier of passengers upon a regular passenger train: *Ohio etc. R. W. Co. v. Dickerson*, 59 Ind. 317. Where a railroad company carries passengers on a freight train, and in such cases requires tickets to be purchased before entering the train, and a passenger disregards the rule, he can be expelled at a regular station only: *Illinois Cent. R. R. Co. v. Sutton*, 42 Ill. 439; and it is not an unreasonable rule for a railroad company to require that persons desiring to ride on freight trains shall procure tickets sold expressly for such trains: *Illinois Cent. R. R. Co. v. Nelson*, 59 Id. 112. It must be observed, however, that the principal case does not hold that a freight train must draw up to the passenger platform, but simply that the passengers must be put off at a station: Id. 114. Prior to the principal case, the law in

Illinois, with respect to recovery of damages for being put off a railroad train, had not been settled. That was the first of this class of cases: *Illinois Cent. R. R. Co. v. Johnson*, 67 Ill. 315; where a passenger was put off the cars of a railroad company by the conductor, for the reason that he had not procured a ticket at the station before getting aboard; and it appeared that the office at the station was closed, when it should not have been, so that no ticket could be had; that the passenger so informed the conductor, and offered to pay the regular fare; that the place where the passenger was put off was not at any station or usual place for putting passengers off the train; and that this was done in the night time, whereby the passenger was compelled to walk back;—under these circumstances it was held that two hundred dollars damages were not excessive. But where a party was ejected from a railroad car unlawfully, and suffered no personal injury, was delayed only one day in reaching home, and his pecuniary loss did not exceed ten dollars, a verdict for one thousand dollars was held excessive in *Chicago etc. R'y Co. v. Chisholm*, 79 Id. 584, 591; and where a passenger paid for a railroad ticket to a certain station, but through inadvertence received a ticket to an intermediate point, and refused to pay fare from the station named in his ticket, which was only twenty cents, and refused to get off, so that he had to be put off by force, and immediately got aboard another coach, agreeing to pay, but while making change made use of grossly profane and obscene language in the presence of ladies, for which he was again forcibly expelled, no more force being used either time than was necessary to overcome his resistance, it was held that a verdict in a suit by him against the company, giving him fifteen hundred dollars, was grossly excessive, and out of all proportion to the injury inflicted upon the plaintiff, other than what was attributable to his own misconduct: *Chicago etc. R. R. Co. v. Griffin*, 68 Id. 499, 507. The principal case was also cited in *Illinois Cent. R. R. Co. v. Whittemore*, 43 Id. 422; S. C., *post*, p. 140; and distinguished in *Chicago etc. R. R. Co. v. Griffin*, 68 Id. 507.

ILLINOIS CENTRAL R. R. CO. v. WHITTEMORE.

[43 ILLINOIS, 420.]

PASSENGER'S REFUSAL TO SURRENDER HIS TICKET TO RAILROAD CONDUCTOR WHEN DEMANDED does not constitute the same offense as the refusal to pay fare, and the statutory prohibition against the expulsion of a passenger for non-payment of fare, except at a regular station, does not apply to the former case.

RAILROAD COMPANY MAY EXPEL PASSENGER FROM ITS TRAIN, AT PLACE OTHER THAN REGULAR STATION, for the violation of any reasonable rule other than that of non-payment of fare.

STATUTE FORBIDS EXPULSION OF PASSENGER AT PLACE OTHER THAN REGULAR STATION, ONLY IN CASE OF REFUSAL TO PAY FARE; and a passenger's neglect to purchase a ticket before entering a railroad train, when required by the rules of the company to do so, amounts in substance to a refusal to pay fare, and justifies an expulsion only at a regular station.

RAILROAD COMPANY HAS RIGHT TO REQUIRE OF ITS PASSENGERS COMPLIANCE WITH ALL REASONABLE RULES tending to promote comfort, convenience, good order, and behavior, and to secure the safety of its trains,

and to enable the company to conduct its business as a common carrier with advantage to the public and to itself.

RAILROAD COMPANY IS BOUND TO CARRY PASSENGER who observes all reasonable rules of the company.

RAILROAD COMPANY HAS COMMON-LAW RIGHT TO EXPEL PASSENGER FROM ITS TRAIN, where he has wantonly disregarded any reasonable rule; but the company must not select a dangerous or inconvenient place, and must use no more force than may be necessary for the expulsion; and this right has been restricted by statute in cases of non-payment of fare only.

RULE OF RAILROAD COMPANY REQUIRING PASSENGERS TO SURRENDER THEIR TICKETS to the conductor, when demanded, is a reasonable one and may be enforced.

COURT MUST DETERMINE WHETHER RULE ADOPTED BY RAILROAD COMPANY IS REASONABLE ONE. Such question is purely one of law, and must be determined by the court, and not the jury, although it is proper for the court to admit testimony as to the necessity of such rule.

RAILROAD COMPANY MUST RESPOND IN DAMAGES IF IT USES UNNECESSARY VIOLENCE in expelling passenger who has wantonly disregarded any of its reasonable rules.

THE facts are stated in the opinion.

Williams and Burr, for the appellants.

Ingersoll, Puterbaugh, and Shaw, for the appellees.

By Court, LAWRENCE, J. This was an action of trespass brought by Whittemore against the Illinois Central Railroad Company and N. W. Cole, a conductor in the service of the company, for wrongfully expelling the plaintiff from a train. It appears the plaintiff had taken passage from Decatur to El Paso, and had procured the necessary ticket. After the train passed Kappa, the station preceding El Paso, the conductor demanded the plaintiff's ticket, which the latter refused to surrender without a check. This the conductor refused to give; and after some controversy with the plaintiff, stopped the train, and with the aid of a brakeman expelled the plaintiff. There is considerable evidence in the record given for the purpose of showing that, even admitting the right of the defendants to expel the plaintiff, an unnecessary and wanton degree of violence was used, from which the plaintiff received a permanent and severe injury. As, however, the case must be submitted to another jury, we forbear from any comments on this portion of it. The jury gave the plaintiff a verdict for \$3,125, for which the court rendered judgment, and the defendants appealed.

In sustaining a demurrer to the fourth plea, and in giving the instructions, the circuit court held that, although the rules of the road required the conductor to take up the plain-

tiff's ticket, and notwithstanding he may have refused to surrender it when demanded, the defendants had no right to expel him from the cars, except at a regular station. In support of this position, it is urged by counsel for appellee that the refusal to surrender the ticket was merely equivalent to a refusal to pay the fare, and that the statutory prohibition against the expulsion of passengers for this cause, except at a regular station, should be applied to cases like the present. We held, in the case of *Chicago etc. R. R. v. Flagg*, 43 Ill. 364 [*ante*, p. 133], that the neglect to buy a ticket before entering the train, when required by the rules of the road, was the same thing in substance as the refusal to pay the fare, and justified an expulsion only at a regular station. But the refusal to surrender a ticket for which the requisite fare has already been paid is certainly not the same thing as refusal to pay the fare. It may be no worse offense against the rights of the railroad company than the refusal to pay the fare, but it is not the same offense. Perhaps there was no good reason why the legislature should have forbidden railways to expel a passenger only at a regular station for the non-payment of fare, and have left them at liberty to expel one at any other point for the disregard of any other reasonable rule. But it has done so, and it is our duty to leave the law as the legislature thought proper to establish it.

What, then, is the right of a railway company in reference to its passengers? Clearly, to require of them the observance of all such reasonable rules as tend to promote the comfort and convenience of the passengers, to preserve good order and propriety of behavior, to secure the safety of the train, and to enable the company to conduct its business as a common carrier with advantage to the public and to itself. So long as such reasonable rules are observed by a passenger, the company is bound to carry him; but if they are wantonly disregarded, that obligation ceases, and the company may at once expel him from the train, using no more force than may be necessary for that purpose, and not selecting a dangerous or inconvenient place. This is a common-law right, arising from the nature of their contract and occupation as common carriers, and, as already remarked, it has been restricted by the legislature only in cases where the offense consists in non-payment of fare: *Chicago etc. R. R. Co. v. Parks*, 18 Ill. 460 [68 Am. Dec. 562]; *Hilliard v. Gould*, 34 N. H. 230 [66 Am. Dec. 765]; *Cheney v. Boston etc. R. R. Co.*, 11 Met. 121 [45

Am. Dec. 190]. If, then, the regulation requiring passengers to surrender their tickets was a reasonable one, the ruling of the court below on this point was erroneous.

That the rule is a reasonable one, really admits of no controversy. It was shown by witnesses on the trial, and must be apparent to any one, that the company must have the right to require the surrender of tickets, in order to guard itself against imposition and fraud, and to preserve the requisite method and accuracy in the management of its passenger department.

The circuit court left it to the jury to say whether the rule was reasonable. This was error. It was proper to admit testimony, as was done, but either with or without this testimony, it was for the court to say whether the regulation was reasonable, and therefore obligatory upon the passengers. The necessity of holding this to be a question of law, and therefore within the province of the court to settle, is apparent from the consideration that it is only by so holding that fixed and permanent regulations can be established. If this question is to be left to juries, one rule would be applied by them to-day and another to-morrow. In one trial, a railway would be held liable, and in another, presenting the same question, not liable. Neither the companies nor passengers would know their rights or their obligations. A fixed system for the control of the vast interests connected with railways would be impossible, while such a system is essential equally to the roads and to the public. A similar view has recently been taken of this question in the case of *Vedder v. Fellows*, 20 N. Y. 126.

The judgment must be reversed; but if it appears, upon another trial, that unnecessary violence was used, the defendants must respond in damages.

Judgment reversed.

FOR NON-PAYMENT OF FARE PASSENGER MAY BE EXPELLED AT REGULAR STATION, BUT NOT ELSEWHERE: See collected cases in note to *Chicago etc. R. R. Co. v. Flagg*, ante, p. 133.

AS TO SECOND POINT IN SYLLABUS, *supra*, see extended note to *Commonwealth v. Power*, 41 Am. Dec. 476, 477; extended note to *Chicago etc. R. R. Co. v. Parks*, 68 Id. 570-573.

RAILROAD COMPANY MAY REQUIRE COMPLIANCE ON PART OF PASSENGERS WITH ALL REASONABLE RULES, including purchase of tickets: *Commonwealth v. Power*, 41 Am. Dec. 473, showing in an extended note what are reasonable rules; extended note to *Chicago etc. R. R. Co. v. Parks*, 68 Id. 570-573; and is bound to carry a passenger who complies with them: Extended note to *Commonwealth v. Power*, 41 Id. 471-486.

PASSENGERS MUST NOT BE EXPELLED IN DANGEROUS OR INCONVENIENT PLACES: *State v. Overton*, 61 Am. Dec. 671; note to *Commonwealth v. Power*, 41 Id. 477; or while the train is in motion: Note to *Chicago etc. R. R. Co. v. Parks*, 68 Id. 572; *Sanford v. Eighth Ave. R. R. Co.*, 80 Id. 286.

RULE REQUIRING SURRENDER OF TICKETS IS REASONABLE ONE, AND MAY BE ENFORCED: See extended note to *Commonwealth v. Power*, 41 Am. Dec. 476; extended note to *Chicago etc. R. R. Co. v. Parks*, 68 Id. 570-573.

REASONABLENESS OF RAILROAD RULES, WHETHER QUESTION OF FACT OR OF LAW: See note to *Commonwealth v. Power*, 41 Am. Dec. 471; *State v. Overton*, 61 Id. 671; *Day v. Owen*, 72 Id. 62; *Morris etc. R. R. Co. v. Ayres*, 80 Id. 215.

RAILROAD COMPANY MUST RESPOND IN DAMAGES FOR USING VIOLENCE IN EXPELLING PASSENGER: *Sanford v. Eighth Ave. R. R. Co.*, 80 Am. Dec. 286, and note 290.

IN EXPELLING PASSENGER, RAILROAD COMPANY MUST USE NO MORE FORCE THAN IS NECESSARY for that purpose: *State v. Overton*, 61 Am. Dec. 671; note to *Chicago etc. R. R. Co. v. Parks*, 68 Id. 572; *O'Brien v. Boston etc. R. R. Co.*, 77 Id. 347; *Johnson v. Concord R. R. Corp.*, 88 Id. 199.

PASSENGER ON RAILROAD TRAIN MUST COMPLY WITH COMPANY'S REASONABLE RULES: *Sullivan v. Philadelphia etc. R. R. Co.*, 72 Am. Dec. 698.

THE PRINCIPAL CASE WAS CITED IN *Chicago etc. Ry Co. v. Williams*, 55 Ill. 188, to the point that for a non-compliance with a reasonable rule of a railroad company other than for non-payment of fare, a party may be expelled from a train at a point other than a regular station. In that case it was held that a railroad company are authorized to make and enforce whatever rules will tend to the comfort, order, and safety of passengers on their road, but that such rules must always be reasonable and uniform in respect to persons. Thus a colored woman cannot be excluded from a car specially set apart for ladies solely on the ground of color.

STRAHORN v. UNION STOCK YARD AND TRANSIT COMPANY.

[48 ILLINOIS, 424.]

FACTOR HAS LIEN FOR GENERAL BALANCE ON PROPERTY OF HIS PRINCIPAL, IN HIS ACTUAL POSSESSION, and such possession is notice of his lien to creditors and purchasers.

CONSIGNOR OF PROPERTY IN TRANSITU HAS RIGHT TO DIRECT CHANGE IN ITS DESTINATION, and have it delivered to a different consignee; and the carrier is bound to obey such direction.

CONSIGNEE, TO ENFORCE LIEN FOR GENERAL BALANCE AGAINST CONSIGNOR, MUST HAVE POSSESSION OF PROPERTY. Thus where property has been shipped to A, and its destination while *in transitu* has been changed by the consignee to B, and A does not get possession of the property before notice is given to the carrier that it is to be delivered to B, A acquires no lien on the property for any general balance against the consignor.

THE facts are stated in the opinion.

J. V. Le Moyne, for the appellants.

George C. Campbell, for the appellees.

By Court, WALKER, C. J. This was an action of trover, brought by appellants in the superior court of Chicago, against appellees, for the recovery of a car-load of hogs. On the trial it appeared in evidence that appellants, in September, 1866, wrote a letter to M. V. Butler, at Iowa City, in which they authorize him to draw on them for five hundred dollars, and for the balance when he gets stock to the railroad; but would not like him to hold it more than a week at a time. On the back of the letter they indorsed the following: —

“First National Bank, Iowa City: We will honor all drafts drawn on us by M. V. Butler. R. STRAHORN & Co.”

Butler gave this letter of credit to Hubbard, the cashier of the bank, and it seems that an arrangement was made by which Butler could, in purchasing hogs, check on the bank to pay for hogs purchased, and then draw upon Strahorn & Co., to cover such advances. Hubbard testifies that Butler never drew in advance of purchases, but made his checks on the bank for his purchases, and afterwards drew upon Strahorn & Co. to cover such advances.

The business continued in this manner until the 30th of January, 1867, when the last draft was drawn by Butler on appellants. This draft was for one thousand dollars, at three days after sight, and was delivered to Hubbard, the cashier, and lacked something of balancing his account with the bank. It seems that between that date and the 3d of February the bank advanced \$1,295.75 to Butler, and he had in the mean time made deposits sufficient to cover the balance against him on the 30th of January, 1867, and to reduce the balance due the bank to \$800.

On the third day of February, Hubbard received a letter from appellants that they would accept no more drafts drawn by Butler. Hubbard thereupon saw Butler at the depot, and learned that the hogs had just been shipped to appellants. He insisted that Butler should secure the bank for the money it had advanced to purchase this car-load of hogs. Butler thereupon sold the hogs to Hubbard for \$1,074.80, being the amount paid for the hogs, and the sums still due the farmers of whom they were purchased, which the bank agreed to and

did afterward pay. The railroad agent at Iowa City was notified of the sale, and Butler gave up the freight receipt, and the railroad company gave to Hubbard a new one, and he directed that the hogs be delivered to Conger & Co., on his account. Butler gave the agent at Iowa City an order to the agent at Chicago, notifying him that he had sold the hogs to Hubbard, and directing him to deliver them on their arrival to R. P. & M. Conger for Hubbard. The order was immediately sent to the agent at Chicago, and he was directed to change the name on the way-bill from Strahorn to Conger & Co.

The hogs arrived at Chicago on Sunday, the 4th of February, and were delivered to appellee. The way-bill named Strahorn & Co., consignee for account of M. V. Butler, with a line erased, and these words written in: "Consignee Conger & Co., account of W. H. Hubbard." The stock was unloaded at the yards and placed in a pen, and fed over Sunday by the order of Strahorn's agent, but the freight was not paid, and an actual delivery was not made to them.

The letter of the agent at Iowa City was received by the agent at Chicago, who sent it to the agent of the railroad company, who had unloaded the hogs and delivered them to the stock company. On Monday morning, the 5th, the stock-yard agent informed the division agent of the yard that the consignment had been changed from Strahorn & Co. to Conger & Co., and that he must change it on the books, which he did, and Strahorn & Co. were informed of the change, and that they must not sell the hogs. The hogs remained in the actual possession of the stock-yard company until they were sold. They made no actual delivery to either consignee.

On Tuesday, the 6th, the railroad agent who delivered the hogs to the stock-yard proposed to both consignees that the hogs be sold, and the money held by the railroad company until it should be decided which of them was entitled to receive it, to which they both agreed. The freight, sixty-four dollars, and the stock-yard charges, eight dollars for corn, and keeping the hogs, were paid by the railroad agent. A demand was made, and a refusal to deliver the hogs, and appellants sued to recover for a conversion. The cause was tried by the court by consent, and the issues were found for defendants. A motion for a new trial was entered, which the court overruled, and rendered judgment according to the finding; to reverse which this appeal is prosecuted.

It is insisted that inasmuch as Butler was indebted to appellants on a general balance, and as he shipped to them this car-load of hogs, appellants thereby acquired such a lien on the property as placed it out of the power of Butler to sell the property to the bank to pay their debt against him. There seems to be no question raised as to the *bona fides* of either of these debts. Appellants' claim was for a balance due on money advanced to pay for previous shipments, while the debt to the bank was for the very money paid on the purchase of these hogs. Had Butler the power while the property was *in transitu* to change its destination, and to have it delivered to a different consignee? In the case of *Winne v. Hammond*, 37 Ill. 99, it was held that a factor has a lien for a general balance on the property of his principal in his actual possession, and that such possession was notice of his lien to creditors and purchasers.

In the case of *Lewis v. Galena etc. R. R.*, 40 Ill. 281, the questions were very similar to these presented by this record. It was there said: "The question, then, is, Has the consignor of the property, which he has put in the possession of a common carrier to be carried and delivered to a designated consignee, a right to change the destination before it is delivered? and can the carrier refuse to obey the consignor's orders to that effect? The principle may be broadly stated that a consignor of goods has the right to direct a change in their destination, and that the carrier is bound to obey such directions." In that case as in this the consignor was indebted to the consignee on a general balance. The court say: "It is in vain to pretend that Campbell and Woodruff had any lien or claim on this grain; it was never in their possession symbolically by bill of lading or actually by delivery before the notice was given to the railroad company by the consignors that they had made advances upon it." Appellants in this case had not acquired possession of the hogs, any more than had the consignees of the grain in that case. In both the bill of lading and contract for the freight described the consignee. The carrier had in each case received the actual possession of the property to be transported, and in the same manner in each case the destination was changed by the order of the consignor. No material difference is perceived in the two cases, and that must govern this. The judgment of the court below is affirmed.

Judgment affirmed.

AS TO FIRST POINT IN SYLLABUS, *supra*, see extended note to *Bigelow v. Walker*, 58 Am. Dec. 167; *Knapp v. Alford*, 40 Id. 241, note 244; *McKenzie v. Nevins*, 38 Id. 291; *Patterson v. McCahey*, 13 Id. 298.

AS TO SECOND POINT IN SYLLABUS, *supra*, see *Bank of Rochester v. Jones*, 55 Am. Dec. 290, note 299; *Wood v. Roach*, 1 Id. 276; extended note to *Rucker v. Donovan*, 19 Am. Rep. 87-92, on right of stoppage *in transitu*.

AS TO THIRD POINT IN SYLLABUS, *supra*, see *Desha v. Pope*, 41 Am. Dec. 76; *Winter v. Coit*, 57 Id. 522; extended note to *Bigelow v. Walker*, 58 Id. 167, on factor's lien. No lien is effectual unless it is accompanied by possession: *Oakes v. Moore*, 41 Id. 379.

BECKMAN v. KREAMER.

[43 ILLINOIS, 447.]

RIGHT TO TAKE FISH BELONGS, AT COMMON LAW, SO ESSENTIALLY TO RIGHT OF SOIL IN STREAMS or bodies of water where the tide does not ebb and flow, that if the riparian proprietor owns upon both sides of such stream, no one but himself may come upon the limits of his land and take fish there; and the same rule applies so far as his land extends, to wit, to the thread of the stream, where he owns upon one side only. Within these limits, by the common law, his right of fishery is sole and exclusive, unless restricted by some local law or well-established usage of the state where the premises may be situate.

RIGHT TO FISH IS PROPERTY, AND MAY BE GRANTED. The right to take fish within the limits of one's own land bounding upon and including a stream not navigable, is so far a subject of distinct property or ownership that it may be granted, and will pass by a general grant of the land itself, unless expressly reserved; or it may be granted as a separate and distinct property from the freehold of the land; or the land may be granted, while the grantor reserves the fishery to himself.

ACTION OF TRESPASS LIES AGAINST A FOR ENTERING UPON B'S LAND AND FISHERY, and taking fish from the waters thereof against the will and protest of the owner, and this independently of the question of ownership in the fish.

APPORTIONMENT OF COSTS UNDER ILLINOIS STATUTE, IN CASE OF APPEAL from a judgment of a justice of the peace, is wholly discretionary with the circuit court, which must take a view of the whole case, ascertain where the justice of it is, and so apportion the costs.

THE facts are stated in the opinion.

H. Loring and W. H. Richerson, for the plaintiffs in error.

William Potter, for the defendants in error.

By Court, BREESE, J. By the common law, a right to take fish belongs so essentially to the right of soil in streams or bodies of water, where the tide does not ebb and flow, that if the riparian proprietor owns upon both sides of such stream,

no one but himself may come upon the limits of his land and take fish there; and the same rule applies so far as his land extends, to wit, to the thread of the stream, where he owns upon one side only. Within these limits, by the common law, his right of fishery is sole and exclusive, unless restricted by some local law or well-established usage of the state where the premises may be situate: Washburn on the Law of Easements and Servitudes, 441, referring to Hargrave's Law Tracts, 5; Woolrych on Waters, 87; *Chalker v. Dickinson*, 1 Conn. 382 [6 Am. Dec. 250]; *Waters v. Lilley*, 4 Pick. 145 [16 Am. Dec. 333]; *Hooker v. Cummings*, 20 Johns. 90 [11 Am. Dec. 249]; *McFarlin v. Essex Co.*, 10 Cush. 304.

This right to take fish within the limits of one's land bounding upon and including a stream not navigable is so far a subject of distinct property or ownership that it may be granted, and will pass by a general grant of the land itself unless expressly reserved; or it may be granted as a separate and distinct property from the freehold of the land; or the land may be granted, while the grantor reserves the fishery to himself.

In this case, the record shows that the plaintiffs below showed either a legal or equitable title to the lands on which the lake was situate, and actual possession and cultivation of the adjacent lands described in the title papers they exhibited.

It appears the lake is a small sheet of water about seven miles from the Kankakee River, and has an outlet to that river. It abounds in fish of a choice kind. The defendants went on it with small boats they had brought with them, equipped with a seine, which they dragged in the lake, against the will and protest of the owners of the land.

This entering upon the land and fishery, which was exclusive in the plaintiffs, was a trespass upon their premises, for which the action of trespass lay, independently of the question of ownership in the fish. The plaintiffs had therefore a clear right to recover for the trespass.

The suit was originally commenced before a justice of the peace, and damages recovered to the amount of twenty-five dollars. On appeal to the circuit court, the jury in that court rendered a verdict for plaintiffs of five dollars, and the court, on motion of defendants there, apportioned the costs, adjudging against the defendants \$181.40, and against the plaintiffs the sum of \$20.60, when it appears that the costs made by the defendants below were \$160, and those made by the plaintiffs below were \$95.50.

The motion of defendants in the circuit court was to apportion the costs "according to the statute."

It is now assigned for error that the apportionment made by the court is not according to the statute. It is argued by plaintiffs in error that this power to apportion the costs, where a recovery has been reduced on appeal, is not discretionary. Section 17 of chapter 26 provides, where the judgment of the justice of the peace shall be affirmed in part, then the court shall divide the costs between the parties according to the justice of the case.

Technically, the judgment of the justice has not been affirmed in part, as the case was tried in the circuit court *de novo*, and a verdict rendered for the plaintiffs for a sum sufficient to carry all the costs against the defendants. But, on the admission that the judgment of the justice was affirmed in part only, it is clear the circuit court must take a view of the whole case, and ascertain where the justice of it is, and so apportion the costs. It is wholly discretionary with the circuit court, and on an examination of the evidence before it, contained in this record, it was not difficult to see that the justice of the case was wholly with the plaintiffs. The defendants entered upon these premises in a riotous and tumultuous manner, equipped with teams, boats, fishing-tackle, and seine, and, against the remonstrances of the proprietors of the land and of the fishery, committed their trespass. Why the plaintiffs should have been required to pay more than a nominal sum in order to a technical compliance with the statute to apportion the costs, we cannot very well see. Apportioning them as was done, if an error, it was one of which the plaintiffs in error cannot complain.

The judgment must be affirmed.

Judgment affirmed.

RIGHT TO FISH IN WATERS INNAVIGABLE: See *Commonwealth v. Chapin*, 16 Am. Dec. 396; *Waters v. Lilley*, 16 Id. 333; *Hooker v. Cummings*, 11 Id. 249. The right exists exclusively in the owner of the adjacent soil: See cases cited. But the right of fishery in navigable waters is common to all: *Commonwealth v. Chapin*, *supra*. The right of several fishery in such waters cannot, however, arise as an incident to riparian ownership: *Collins v. Benbury*, 38 Id. 722. Such a right depends upon right to soil: *Collins v. Benbury*, 42 Id. 155.

BAKER v. YOUNG.

[44 ILLINOIS, 42.]

IN ACTION FOR SLANDER, PLAINTIFF MUST PROVE LANGUAGE LAID IN DECLARATION, or so much, at least, as fully sustains the charge; equivalent words in meaning will not be sufficient. All the words need not be proved if those which are proved fully establish the slander; but if other words not laid are proved, which limit or change the meaning of those counted on, the action cannot be sustained. If all the words laid are necessary to constitute the slander, they must be proved as laid.

VARIANCE DOES NOT EXIST BETWEEN WORDS LAID AND WORDS PROVED, in an action for slander, because more words were proved than laid, where the injury complained of was charging the plaintiff, an unmarried woman, with fornication, and the additional words proved did not alter the charge, but only specified with whom the offense was committed, and that an effort had been made to produce an abortion.

INSTRUCTION IS NOT ERRONEOUS, AS BEING CALCULATED TO MISLEAD JURY by implying that it did not matter how the words were connected, nor as assuming that a sufficient number of words had been proved, where, in an action for slander in charging the plaintiff with fornication, the jury were informed that if they believed a sufficient number of words laid in the declaration to amount, in their common acceptance, to a charge of fornication, had been proved to have been spoken by the defendant, they should find for the plaintiff.

INSTRUCTION IS NOT ERRONEOUS, AS ASSUMING GUILT OF DEFENDANT, or the circumstances of the case, where, in an action for slander, the jury were informed that the law implied damages from the speaking of actionable words, and that the defendant intended the injury the slander was calculated to effect.

ACTION FOR SLANDER COMMITTED BY WIFE ALONE DURING MARRIAGE MUST BE BROUGHT AGAINST HUSBAND AND WIFE JOINTLY; and if the jury finds that the wife spoke the slanderous words, a verdict must be found against both defendants.

VERDICT IN ACTION AGAINST HUSBAND AND WIFE FOR SLANDER COMMITTED BY WIFE IS SUFFICIENT where it simply finds the defendants guilty and assesses the damages, instead of stating that it found the defendants guilty in manner and form as alleged in the declaration.

CREDIBILITY OF WITNESSES AND WEIGHT OF EVIDENCE ARE QUESTIONS for the determination of the jury.

VERDICT IN ACTION FOR SLANDER WILL NOT BE SET ASIDE FOR EXCESSIVE DAMAGES unless the damages are palpably excessive, or there was manifest prejudice or other misconduct of the jury.

CASE, brought by Augusta Young, an unmarried woman, against Ludwig Baker and his wife, Caroline Baker, for slander alleged to have been uttered by the wife, in charging the plaintiff with fornication. The jury returned the following verdict: "We, the jury, find the defendants guilty, and assess the damages at eight hundred dollars." The defendants' motions for a new trial and in arrest of judgment were overruled, and the defendants appealed. Further facts appear in the opinion.

Goodwin and Williams, for the appellants.

Barge and Heaton, for the appellee.

By Court, WALKER, C. J. In actions for slander, the plaintiff must prove the language laid in the declaration, or so much, at least, as fully proves the charge. Equivalent words in meaning will not be sufficient. It is true that all of the words in the sentence need not be proven, if those which are proved fully establish the slander. If, however, other words not laid are proved, which limit or change the meaning of those counted on, the action will not be sustained. If all the words laid are necessary to constitute the slander, then they must be proved as laid: *Sanford v. Geddis*, 15 Ill. 228; *Patterson v. Edwards*, 2 Gilm. 20; *Williams v. Odell*, 29 Ill. 156.

The words relied upon as having been proved are contained in the second count, and are these: "'Gusta Young was in the family way, and Rink and his wife took her to a Chicago doctor to have the child worked off." "'Gusta Young is in the family way, and Rink and his wife took her to a Chicago doctor to have the child worked off." Mrs. Snyder testifies that Mrs. Baker stated that "Augusta Young was in the family way by Tom Beal." William Snyder testified that she stated, "'Gusta Young is in a family way"; "'Gusta Young is in a family way with Tom Beal"; Rink and his wife had taken her to Chicago to have it worked off, or, "to have the child worked off"; can't tell which. He again states the latter words both ways. It is urged that there is a variance between the words laid and the words proved, because more are proved than laid.

The declaration proceeds for an injury in charging appellee with fornication, and under the authorities above referred to, if enough of the words were proved to establish the slander, then appellee was entitled to recover. Snyder swears to one set of the words as laid. He also swears to another with additional words, but which in no sense alter or change the slander. They only point out more specifically the manner of the offense charged. They only specify the person with whom it was charged that appellee had committed fornication, and that an effort had been made to produce an abortion. This is equally true of Mrs. Snyder's testimony. These additional words did not alter the charge, that appellee, who was an unmarried woman, was pregnant, and which implied that she had been guilty of fornication as charged in the dec-

laration. We are therefore of the opinion that the jury were warranted in finding that there was no variance, and that the slander was proved.

It is urged, however, that the fifth of appellee's instructions was erroneous, being calculated to mislead the jury. It informed them that if they believed from the evidence that a sufficient number of words laid in the declaration, to amount, in their common acceptation, to a charge of fornication against appellee, had been proved to have been spoken by Caroline Baker, they should find for appellee. We have seen that such is the law. But it is insisted that it informed the jury it did not matter how the words were connected, whether uttered in the same sentence, connection, conversation, or otherwise. This is not the natural import of the language of this instruction, nor do we suppose the jury so understood it, when we can see that connected clauses of sentences proved would, in their natural construction, clearly imply the charge. Had it been otherwise, then the instruction might have been liable to the criticism placed upon it by appellants. Nor do we see that the instruction assumes that a sufficient number of words had been proved to establish the slander. The jury are told that if they believe that such words had been proved, they would find for appellee.

It is insisted that the seventh of appellee's instructions was erroneous. It informs the jury that in actions for slander the law implies damages from the speaking of actionable words, and also that the defendant intended the injury the slander is calculated to effect; and the jury, in case they find a verdict of guilty, are to determine from all the circumstances in the case what damages ought to be given, and are not confined to mere pecuniary loss or injury. We do not think that this instruction can be reasonably understood to assume the guilt of appellee, or the circumstances in the case, as insisted by appellants. It simply lays down a rule of law applicable to cases of slander, and leaves the jury to apply it to the case under consideration. The natural import of the language is not that the defendant named in the instruction is the defendant in this case, or that the circumstances were those in this case, but that the instruction refers to any defendant or the circumstances in any case of slander. We are therefore of the opinion that it announces a correct principle of law, applicable to this case, and did not mislead the jury.

It is objected that the verdict is insufficient to sustain the

judgment. It is urged that the plaintiff Ludwig Baker did not become *particeps criminis*, and should not be found guilty without having been accused, and having an opportunity of defending himself. The words in this case were spoken by the wife alone, and the question sought to be raised is, whether a judgment can be recovered against him for slander uttered by the wife. The rule is laid down by Chitty, that for torts committed by the wife, during marriage, as for slander, assault, etc., or for any forfeiture under a penal statute, they must be jointly sued; but that they cannot be jointly sued for slander by both: 1 Chit. Pl. 92. From this rule, and it seems to be fully supported by authority, if the jury found in this case that the wife spoke the words, they were compelled under the issue and the law to find a verdict against both defendants, they being husband and wife. Nor do we see that the verdict is defective because it fails to state that they found appellants guilty in manner and form as alleged in the declaration. This would, no doubt, have been strictly formal; but such was the obvious meaning of their finding. It was, we think, clearly responsive to the issue.

As to the question of the credibility of witnesses, that was for the determination of the jury. In the conflict of evidence, whether real or only apparent, it was for them to give weight to such portions as they found to be worthy of belief. In this case we see no reason for disturbing the verdict, because it is not sustained by the evidence. Nor can we say that the damages found were excessive. That was a question for the finding of the jury, and will not be disturbed, unless the damages are palpably excessive, or there was manifest prejudice, or other misconduct of the jury. We are, after a careful examination of this entire record, unable to perceive any error for which the judgment of the court below should be reversed, and it must therefore be affirmed.

Judgment affirmed.

SUBSTANCE ONLY OF WORDS LAID IN DECLARATION NEED BE PROVED IN ACTION FOR SLANDER: *Hersh v. Ringwalt*, 2 Am. Dec. 392; *Hume v. Arrasmith*, 4 Id. 156; *Treat v. Browning*, 10 Id. 156; *Wheeler v. Robb*, 12 Id. 245, and note; *Estes v. Antrobus*, 13 Id. 496; *Purple v. Horton*, 27 Id. 167; *Commons v. Walters*, 27 Id. 635; *Slocumb v. Kuykendall*, 27 Id. 764; but proof of similar or equivalent words will not be sufficient: *Wheeler v. Robb*, *Commons v. Walters*, *Slocumb v. Kuykendall*, *supra*; *Wallace v. Dixon*, 82 Ill. 205, citing the principal case; and see the principal case also referred to in *Thomas v. Fischer*, 71 Id. 579, in holding that certain slanderous words were proved substantially as laid.

HUSBAND AND WIFE ARE JOINTLY LIABLE FOR TORT COMMITTED BY WIFE ALONE DURING MARRIAGE: *Brasil v. Moran*, 83 Am. Dec. 772, and note; *Ball v. Bennett*, 83 Id. 356; *Keen v. Hartman*, 86 Id. 606; S. C., 88 Id. 472.

VERDICT WHEN SET ASIDE FOR EXCESSIVE DAMAGES: See *Ross v. Innis*, 85 Am. Dec. 373, and note

LINESS v. HESING.

[41 ILLINOIS, 112.]

ACTION WILL NOT LIE TO RECOVER BACK MONEY SENT BY ONE PERSON TO ANOTHER with the object of inducing the latter to use his influence to obtain the nomination to a public office of the former without reference to fitness for the position or the public good, and the person receiving the money did not use his influence for the applicant, but against him.

ACTION by Joseph Liness against Anthony C. Hesing, the editor of a German newspaper, to recover back twenty dollars sent by Liness to Hesing with the object of inducing Hesing to use his influence to obtain the nomination of Liness to the office of clerk of the police court in Chicago. Hesing did not use his influence for Liness, but against him. The defendant had a judgment in his favor, whereupon the plaintiff sued out a writ of error.

Haines, Story, and King, for the plaintiff in error.

John Lyle King, for the defendant in error.

By Court, LAWRENCE, J. Liness being desirous of procuring the office of clerk of the police court in the city of Chicago, sent to Hesing the following letter:—

“(Private.)

“CHICAGO, April 7, 1865.

“A. C. HESING, Esq., Present.

“*Dear Sir*,—Inclosed please find twenty dollars, for which please use your influence to get me nominated for police court clerk; if I get the nomination, call on me for twenty more.

“I am, sir, very truly yours,

“JOSEPH LINESS.”

Hesing used his influence, not for Liness, but against him, whereupon the latter brings this action to recover the twenty dollars. The object of sending this money was to secure the nomination and election of the plaintiff to a public office of trust and responsibility without reference to his fitness for the

position or the public good. It was an attempt to influence, by moneyed considerations, the action of the defendant in a matter where every person should be governed solely by a regard for the public welfare. The principle is well settled that courts will lend no sanction to transactions of this character by recognizing them as the basis of legal obligations. *Ex turpi causa non oritur actio*. We must leave these parties as we find them.

Judgment affirmed.

CONTRACTS ON CONSIDERATION OF SECURING NOMINATION, ELECTION, OR APPOINTMENT TO PUBLIC OFFICES ARE VOID: *Faurie v. Morin*, 6 Am. Dec. 701; *Swayze v. Hull*, 14 Id. 399; *Filson v. Himes*, 47 Id. 422; note to *Parsons v. Trask*, 66 Id. 509, 510; and contracts based on the sale of public offices are likewise void: *Eddy v. Capron*, 67 Id. 541, and note collecting prior cases.

THE PRINCIPAL CASE IS REFERRED TO in *Compton v. Bunker Hill Bank*, 96 Ill. 307, on the point that a court of equity will not interfere where parties have entered into a contract for an illegal purpose.

DIVERSY v. KELLOGG.

[44 ILLINOIS, 114.]

GENERAL AGENT'S POWER TO BIND PRINCIPAL, WITHIN SCOPE OF AUTHORITY FORMERLY POSSESSED BY HIM, CONTINUES until persons with whom the agent has dealt and continues to deal are informed of the termination of the agency.

AUTHORITY OF AGENT, WHO TRAVELS TO SOLICIT ORDERS FOR COMMERCIAL HOUSE, DOES NOT EMBRACE POWER to cancel his contracts and receive back goods shipped to and not satisfactory to a customer.

PROPERTY IN GOODS SOLD VESTS IN PURCHASER, and they are at his risk from the time they are shipped, if the vendor ships within a reasonable time the amount and quality of goods ordered, in the manner directed. As soon as the goods are delivered to a carrier the title vests in the purchaser, subject only to stoppage *in transitu*.

LOSS FALLS ON PURCHASER OF GOODS, if after shipment of the amount and quality, in the manner directed, a portion is abstracted and others of an inferior quality substituted by third persons, so as to render the whole of an inferior quality.

PURCHASER WHO RECEIVES AND APPROPRIATES GOODS OF DIFFERENT KIND FROM THOSE ORDERED thereby makes them his own, and is liable to pay what they are reasonably worth.

PURCHASER IS NOT BOUND TO ACCEPT GOODS OF DIFFERENT QUALITY FROM THOSE ORDERED, but may, upon learning of their quality, within a reasonable time, give notice that he declines to receive them, and thereby avoid liability.

PROPERTY IN GOODS OF DIFFERENT QUALITY FROM THOSE ORDERED DOES NOT VEST IN PURCHASER until he accepts them with a knowledge of their quality, or after he has a reasonable opportunity of determining their quality; and the question of acceptance is one for the jury.

VENDOR'S FAILURE TO NOTIFY PURCHASER OF SHIPMENT OF GOODS ORDERED BY GENERAL AGENT will not release the purchaser from liability for the acts of the agent after the agency has ceased, or relieve him from giving notice of the termination of the agency, the goods having been ordered, shipped, and received by the agent, in the usual course of trade.

ADMISSIONS OF PARTY, WHEN INTRODUCED BY OPPOSITE PARTY AS EVIDENCE GENERALLY, are proper for all legitimate purposes.

ASSUMPSIT by Ebenetus B. Kellogg against Michael Diversy, to recover the price of a pipe of gin. The plaintiff declared upon the common counts. The defendant pleaded the general issue, with notice of recoupment and set-off. On September 29, 1862, one Combs, a traveling agent to solicit orders for the plaintiff, who was a wholesale liquor dealer in New York, received an order from the defendant through one Rose, for three fourths of a pipe of Cologne gin, with directions to ship it by the line of the Western Transportation Company. The gin was shipped as directed, and arrived at Chicago. After lying several days at the depot, without being called for, it was sent to the warehouse of the agent for lost freight, who mailed a notice to the defendant. On the next day Rose called with the notice, represented that he was acting for the defendant, paid the freight, receipted for the gin in the defendant's name, and removed it to the store of Myers and Turney, who had previously bought out the defendant's stock, where, on November 18th, while being raised to an upper story, it fell and burst. It was shown that in September, when the gin was ordered, Rose was acting as the defendant's general agent, having charge of the defendant's store. It was claimed by the defendant that Rose's authority had been revoked at the time the gin was received, but certain witnesses testified that Rose was still attending to the defendant's business in closing it up at the time the gin was lost. Rose testified that he took the gin from the warehouse without knowing "whence it came." No notice was given the plaintiff of the termination of Rose's agency, nor did the plaintiff notify the defendant of the shipment. The defendant introduced evidence to show that the gin was of inferior quality; but on the other hand, Combs testified that he knew a good article of imported gin had been shipped to the defendant. There was evidence that after the gin came into the possession of Rose, Combs tried to sell it to other parties, saying that it was not satisfactory to the defendant. The defendant requested a number of instructions to be given the jury. The fifth and tenth, which are given in substance in the opinion, were refused. The court also struck

out the last clause of the ninth, which read: "The plaintiff can only use Mr. Diversy's affidavit to show admissions against the defendant, and not for the purpose of attacking the defendant's veracity." The plaintiff had a verdict. The defendant's motions for a new trial and in arrest of judgment were overruled, and judgment entered on the verdict. The defendant appealed, assigning as errors the refusal to give his fifth and tenth instructions, and the modification of the ninth; because the verdict was against the evidence; and because the motion for a new trial was overruled.

Edward Martin, for the appellant.

G. W. Brandt, for the appellee.

By Court, WALKER, C. J. It is first insisted that Rose was not at the time he received the liquor paid the charges, and gave the receipt in appellant's name, his agent. The evidence clearly establishes the fact that he was his agent, and had authority to order the liquor in September. And whether he was acting as such, or whether his authority had been revoked when he received this consignment, was a question for the determination of the jury. On that question the evidence was conflicting. He says it had ceased, but others state that he was attending to appellant's business in closing it up, and he evidently assumed to have authority to act for him, in giving the receipt to the warehouseman in appellant's name, and removing the liquor to his late place of business. Nor does it appear that any person was informed that he had ceased to act as appellant's agent during the time all these transactions were occurring. We are therefore of the opinion that the jury were warranted in finding that his acts were binding upon appellant.

Whether Combs was authorized to or did rescind the contract, and receive the liquor from Rose for appellant, were also questions for the consideration of the jury. And on the first of these questions there seems to be no evidence, unless it can be inferred that an agent who travels to solicit orders for a commercial house also has authority to cancel his contracts, and receive back goods shipped to and not satisfactory to a customer. The nature of the employment would not seem to embrace such authority, and we cannot judicially know that it does, and in the absence of proof, we cannot hold that it was within the scope of his agency. On the other question, if it were conceded that such an agency embraces

the authority to take goods back, after an order has been filled, the evidence is uncertain. Combs seems to have offered to sell the liquor as the property of appellant, and not as that of appellee; while Rose says he did take the liquor back. In this conflict, it was for the jury to determine, and we are not disposed to disturb their finding.

It is again urged that the liquor was not of the quality ordered, and appellant was not, therefore, bound to accept it.

If appellee shipped within a reasonable time the amount and quality of liquor sold to appellant, in the manner directed, the property vested in the latter, and it was at his risk from the time it was shipped. If after shipment a portion was drawn out by others, and it was filled with other spirits, so as to render it of an inferior quality, then the loss must fall upon the purchaser. As soon as goods are delivered to a carrier under a contract of sale, the title vests in the purchaser, subject to stoppage *in transitu*, but with no other lien, unless expressed in the terms of the sale. In this case, Combs states that he knew a good article of imported gin was shipped to appellant, as directed, and if this be true, and the jury seem to have so found, no reason is perceived why appellant should not pay for it.

Or even if a different kind from that which was ordered was shipped, and appellant received it and appropriated it, he thereby made the property his own, and must be held liable to pay what it was reasonably worth under the common counts.

If it was a different quality from that purchased, he was not bound to accept it, but might, upon learning its quality within a reasonable time, give notice that he declined to receive it, and thereby avoid liability.

In that case, the property would not become his until he accepted it with a knowledge of its quality, or after having a reasonable opportunity of determining its quality. In this case, there is evidence strongly tending to prove an acceptance, and it was for the jury to say whether the appellant did by his agent receive the liquor, and retain it an unreasonable time after acceptance without giving notice that it was rejected. There seems to be no evidence which explains why it was taken from the warehouse, if, as Rose says, "he did not know whence it came." He knew that he had given the order, and must have known the character of the contents of the cask, and we cannot believe, unless some explanation

was given, that he did not know that it was from appellee, and he does not pretend that he notified him that the liquor was rejected.

It is insisted that the court erred in refusing to give the fifth instruction asked by appellant. It asserts that appellee could only recover by showing that Rose was appellant's general agent, and acted within the scope of his authority, or was his special agent to receive this pipe of gin; and unless he proved that his general agency was continued after appellant sold his store to Myers and Turney, or that Rose was specially authorized to receive the particular pipe of gin. This instruction ignores entirely the fact that if Rose was the general agent of appellant, and as such was acting within the scope of his authority when he ordered the gin of appellee, his acts would still bind appellant within the scope of that authority after it ceased, until appellee was informed of that fact.

This instruction was therefore properly refused by the court.

The tenth instruction asked by appellant and refused by the court asserts that if the transaction was merely a conditional order to send a certain quality of gin if it could be found, and appellant received no advice of shipment, he was not compelled to notify appellee that Rose's agency had ceased, in order to relieve himself from responsibility for Rose's unauthorized acts, after appellant had sold to Myers and Turney. We do not perceive upon what principle the failure of appellee to notify appellant of the shipment could release him from the acts of his former agent, or relieve him from giving notice that his agency has ceased. We do not know, as a matter of law, that appellee neglected any duty in failing to give notice of shipment when the goods came in the regular time of transportation. The goods were ordered, shipped, and received, so far as we can see, in the usual course of trade, and the failure to advise appellant, in such a case, that the goods had been shipped, released appellant from no liability or duty. We therefore perceive no error in refusing this instruction.

The last clause of the ninth instruction asked by appellant was not improperly stricken out before it was given. When the admissions of a party are introduced in evidence by the opposite party, as evidence generally, they are proper for all legitimate purposes. When admitted, if inconsistent and contradictory, they might be entitled to but little weight, or if they showed a want of veracity, that would be his misfortune.

But in this case his veracity was not in issue, and we do not perceive that this clause of the instruction was pertinent to any issue before the jury. We do not see that any injury resulted to appellant from the modification of the instruction.

After a careful examination of this entire record we perceive no error, and the judgment of the court below must be affirmed.

Judgment affirmed.

NOTICE OF REVOCATION OF AGENCY, NECESSITY OF: See *Tier v. Lampeon*, 82 Am. Dec. 634, and note discussing the question; *Copen v. Pacific Mutual Ins. Co.*, 64 Id. 412. The principal case is cited in *Ulrich v. McCormick*, 66 Ind. 246, to the point that where a party is shown to have been the agent of another in a particular business, and continues to so act within the scope of his former authority, it will be presumed that his authority still continues, and will bind his principal, unless the persons with whom he acts have notice that his agency has ceased.

DELIVERY OF GOODS TO COMMON CARRIER, WHETHER DELIVERY TO PURCHASER: See *Bradford v. Marbury*, 46 Am. Dec. 264; *Loyd v. Wight*, 65 Id. 636. Where goods are shipped to a purchaser, the property vests in him and is at his risk from the time they are shipped, if they are of the kind and description ordered: *Ellis v. Roche*, 73 Ill. 281; *Merchants' Despatch Co. v. Smith*, 76 Id. 543; and any subsequent loss would fall upon him: *Wolf v. Dietrich*, 75 Id. 206. The principal case is cited to the foregoing propositions.

VENDOR IS NOT BOUND TO ACCEPT GOODS OF DIFFERENT KIND OR QUALITY FROM THOSE ORDERED; but if he receives and appropriates them, he is bound to pay for them: *Howard v. Hoey*, 35 Am. Dec. 572, and note; *Barton v. Kane*, 84 Id. 728; *Reed v. Randall*, 86 Id. 305, and note.

THE PRINCIPAL CASE IS CITED in *Chicago etc. Ry v. Button*, 68 Ill. 411, to the point that where an admission is deliberately and understandingly made and precisely identified, it often affords evidence of the most satisfactory nature.

JOHNSON v. JONES.

[44 ILLINOIS, 142.]

PRESIDENT OF UNITED STATES HAS NO RIGHTFUL POWER IN TIME OF PEACE TO CAUSE ARREST OF CITIZEN of one state without process, and without any charge of crime legally preferred, and convey him to another state, and there imprison him, without judicial writ or warrant, in a military fortress.

CITIZEN HAS RIGHT TO HIS PERSONAL LIBERTY, except when restrained of it upon a charge of crime, and for the purpose of judicial investigation, or under the command of the law pronounced through a judicial tribunal.

ANY SOLDIER HAS RIGHT, IN TIME OF WAR, TO ARREST BELLIGERENT engaged in acts of hostility toward the government, and lodge him in the nearest military prison, and to use such force as may be necessary for that purpose, even unto death. This is the law of war.

BELLIGERENT IS SUBJECT OF HOSTILE POWER, and his character in that regard depends upon that of the community to which he belongs.

PEOPLE OF CONFEDERATE STATES WERE RECOGNIZED AS BELLIGERENTS during the Civil War, but citizens and residents of the Northern states, not engaged in war, were not belligerents, and subject to arrest by the federal authorities as prisoners of war, although they were domestic plotters against the government of the United States, in full sympathy with the confederates, and rendering them moral co-operation and aid.

MILITARY LAW CONSISTS OF RULES PRESCRIBED BY CONGRESS for the government and discipline of troops, and applies only to persons in the military or naval service of the government.

MARTIAL LAW IS NOT LAW IN ANY PROPER SENSE, but merely the will of the military commander, to be exercised by him only on his responsibility to his government or superior officer; and when once established, it applies alike to citizen and soldier.

MARTIAL LAW MUST BE PERMITTED TO PREVAIL ON ACTUAL THEATER OF MILITARY OPERATIONS in time of war as an unavoidable necessity, resulting from the very nature of war.

COMMANDING OFFICER MAY ARREST PERSON, whether citizen or alien, under authority of martial law, whom he finds within his lines giving aid or information to the enemy, and detain him so long as may be necessary for the security or success of his army.

GOVERNMENT MAY BE JUSTIFIED IN TREATING DISTRICT AS VIRTUALLY ATTACHED TO THEATER OF MILITARY OPERATIONS, and in enforcing martial law therein, so far as may be necessary to the public safety, if in a district remote from the theater of military operations the popular sentiment is so disloyal to the government that one who aids and abets the public enemy cannot be rendered powerless for mischief and brought to justice by the arm of the civil law.

EXERCISE OF MARTIAL LAW CAN BE DEFENDED UPON NO GROUND beyond its enforcement on the actual field of military operations, which is the result of an overmastering necessity, and its establishment in districts which, though remote from the seat of war, are yet so far in sympathy with the public enemy as to obstruct the administration of the laws through civil tribunals, and render a resort to military power a necessity, as the only means of restraining disloyalty from overt acts, and preserving the authority of the government.

WAR DOES NOT OF ITSELF SUSPEND AT ONCE AND EVERYWHERE CONSTITUTIONAL GUARANTIES of liberty and property.

MARTIAL LAW CANNOT BE RESORTED TO IN THAT PART OF COUNTRY where the civil courts, in the midst of loyal communities, are exercising their ordinary jurisdiction, although the government may be prosecuting a war for the suppression of a rebellion in other parts of the country; and if a person is arrested in such a loyal community, and deprived of his liberty by order of the President of the United States as commander-in-chief, and as incident to a state of war, without legal process, for alleged disloyal practices therein, such arrest will be unlawful, and the parties making it will be liable to an action therefor.

CONGRESS HAS NO POWER THROUGH RETROSPECTIVE LAW TO DENY ALLEDGES TO PERSON whose property or liberty was illegally taken under a military order.

DEFENDANT IN ACTION FOR TRESPASS FOR ILLEGAL ARREST MAY PROVE IN MITIGATION OF VINDICTIVE OR EXEMPLARY DAMAGES, and for the pur-

pose of rebutting the presumption of malice, that the arrest was made by virtue of an order of the President of the United States in time of war for alleged disloyal practices of the plaintiff, although a special plea setting up such order is not a bar to the action. Breece, J., dissenting.

DEFENDANT IN ACTION FOR TRESPASS, WHO HAS PLEADED GENERAL ISSUE, MAY AT HIS OPTION CLAIM BENEFIT OF JUDGMENT on demurrer in favor of a co-defendant who has pleaded specially, if such special plea shows that the plaintiff cannot maintain his action against either, or he may insist on a trial of the issue made by his own plea.

IF DEFENDANT IN ACTION FOR TRESPASS, WHO PLEADS GENERAL ISSUE, SEEKS TO AVAIL HIMSELF OF JUDGMENT ON DEMURRER TO SPECIAL PLEA OF CO-DEFENDANT, and the court permits it, the plaintiff can except, and preserve against them in the record the same question raised by his demurrer to the special plea; but if the defendant insists upon a trial of the issue made by his own plea, a verdict and judgment may be had according to the evidence.

ACTION OF TRESPASS IS SEVERAL AS TO EACH DEFENDANT, and each has a right to make his own defense, and to have it tried, without being compelled to rely upon a defective defense made by a co-defendant.

TRESPASS. The facts are stated in the opinion.

M. Y. Johnson and David Sheean, for the appellant.

C. Beckwith, B. F. Ayer, and F. H. Kales, for the appellees.

By Court, LAWRENCE, J. This was an action of trespass brought by Madison Y. Johnson against J. Russell Jones, Elihu B. Washburne, John C. Hawkins, Oliver P. Hopkins, and Bradner Smith. The declaration alleges that on the twenty-eighth day of August, 1862, in the county of Jo Daviess, and state of Illinois, the defendants with force and violence assaulted and arrested the plaintiff, and conveyed him on board the railway cars; that they transported him by the cars to Chicago, where they restrained him of his liberty for the space of two days; that they then conveyed him by force to the city of New York; that he was there imprisoned in Fort Lafayette for the space of two months; that he was then taken to Fort Delaware, in the state of Delaware, where he was imprisoned for the further space of three months, when he was set at liberty without trial or examination, or any offense being charged against him.

All the defendants pleaded not guilty. The defendants Jones, Hawkins, and Hopkins also filed special pleas, in which they set up the then existence of the rebellion, and aver that the plaintiff was an active member of a disloyal secret society known as the Knights of the Golden Circle; that this society was in league and sympathy with the rebels, and was a co-

operating branch of the rebellion, in the Northern states, and plotting with the rebels for the overthrow of the government; and that said plaintiff was deeply engaged in aiding said society in their treasonable purposes, and was in fact levying war against the United States. The pleas further aver that the defendant Jones was at that time United States marshal for the northern district of Illinois, and that said defendants Hawkins and Hopkins were his deputies; that as such marshal he was ordered by the President of the United States to arrest said plaintiff, as a measure proper for the suppression of the rebellion, and convey him to Fort Lafayette; and that he did so arrest him and convey him to said fort in a comfortable manner, and there delivered him to the custody of the officer in command of said fort, after which time the plaintiff was not in the custody of the defendant.

Another plea sets up the issuance of the President's proclamation of July 4, 1862, calling for three hundred thousand volunteers, and avers that the plaintiff was actively engaged in discouraging and preventing volunteering.

To these special pleas the plaintiff demurred. The demurrer was overruled, and the plaintiff abiding by it, the court rendered final judgment on the demurrer in favor of the defendants who pleaded specially. The court, then, on motion of those who had only pleaded not guilty, and against the objection of the plaintiff, impaneled a jury to try the issue made by that plea, and the plaintiff offering no evidence, a verdict and judgment were given for those defendants. The plaintiff has brought the record to this court.

It will be observed that, when the arrest was made for which this suit was brought, there had been no general suspension of the writ of *habeas corpus*. We are not, therefore, under the necessity of considering the effect of a suspension of that writ upon the right of the government to make military arrests,—a subject upon which eminent jurists have widely differed. This plaintiff was arrested on the 28th of August, 1862. The first proclamation of the President applicable to the state of Illinois, and to all persons anywhere arrested by the military authorities, was issued September 24, 1862. Doubts having been expressed as to the power of the President to suspend the writ without the authorization of Congress, that body, on the 3d of March, 1863, passed an act authorizing the President to suspend it wherever, in his judgment, the public safety should require it. Acting under this authority, the President issued

his second proclamation of the 15th of September, 1863. We refer to these historical facts merely for the purpose of showing that the present case must be adjudged without reference to the question of what power the President had to make arrests during the late rebellion after the writ had been suspended.

Do these pleas, as above set forth, justify the alleged trespass?

That the President of the United States has the rightful power in time of peace to cause a marshal to arrest a citizen of Illinois without process and without any charge of crime legally preferred, and convey him to a distant state, and there imprison him without judicial writ or warrant in a military fortress, is a proposition which no one would have the hardihood to assert. That such power in a season of peace cannot be safely intrusted to any government by a people-claiming to be free is a political truism lying beyond the domain of argument. The right of the citizen to his personal liberty, except when restrained of it upon a charge of crime and for the purpose of judicial investigation, or under the command of the law pronounced through a judicial tribunal, is one of those elementary facts which lie at the foundation of our political structure. The cardinal object of our constitution, as it is the end of all good government, is to secure the people in their right to life, liberty, and property. The more certainly to attain this end, the framers of our constitution not only proclaimed certain great principles in the bill of rights, but they distributed governmental power into three distinct departments, each of which, while acting in its proper sphere, was designed to be independent of the others. To the legislative department it belongs to declare the causes for which the liberty of a citizen may be taken from him; to the judicial department to determine the existence of such causes in any given case; and to the executive to enforce the sentence of the court. If a citizen can be arrested, except upon a charge of violated law, and for the purpose of taking him before some judicial tribunal for investigation, then it is plain that the executive department has usurped the functions of the other two, and the whole theory of our government, so far as it relates to the protection of private rights, is overthrown.

But on this question we are not left merely to arguments drawn from the general spirit and object of our constitution. Our forefathers had fresh in their memory the struggles which it had cost in England to secure those two great charters of

freedom, the Magna Charta of King John's time, and the Bill of Rights of 1688, and they incorporated into our fundamental law whatever was most valuable in those instruments for the security of life, liberty, and property. They provided in article 4 of the amendments that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized." They further provided, in article 5, that "no person shall be deprived of life, liberty, or property without due process of law"; and in article 6, that "in all criminal prosecutions the accused shall enjoy the right of a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law; and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense."

It cannot be denied that when this plaintiff was arrested without writ or warrant, and conveyed by the marshal to the city of New York, and there delivered, not into the custody of the law upon a criminal charge, but to a military officer, to be imprisoned in a military fortress, without judicial investigation and without even the charge of crime, the letter and the spirit of all the foregoing provisions of the constitution were plainly violated, unless under the state of facts set forth in the pleas their operation as to the plaintiff had been temporarily suspended. Was such the fact? On the answer to this question must depend the decision of this case.

It is urged by the counsel for the defendant that, although the government cannot lawfully make an arrest of this character in time of peace, the power is necessarily incident to a period of war when exercised in regard to those who are giving aid and comfort to the enemy. The argument, briefly stated, is as follows: The facts set up in the plea, and admitted by the demurrer, show that the plaintiff was co-operating with the rebels. The rebellion was more than an insurrection. It was a public war, as decided by the supreme court of the United States in the *Prize Cases*, reported in 2 Black, 635, at least after the passage of the act of Congress of July 13, 1861. Being a

public war, the government could exercise both belligerent and sovereign rights. While the rebels did not cease to be rebels, they were at the same time public enemies, and the government had the right so to treat them, notwithstanding they were citizens of the United States. It could exercise against them as public enemies all the powers given or recognized by the laws of war; and if the plaintiff was co-operating with them in the manner stated in these pleas, he too was a public enemy, and liable, not merely to prosecution in the civil courts, but to be arrested and imprisoned by the military power as a prisoner of war or a belligerent.

We have tried to state the argument of the defendants' counsel fairly. Its fallacy consists in the assumption that the plaintiff, by virtue of the facts alleged in the pleas, could be regarded as a belligerent in any such sense as to make him a prisoner of war. There is, it is true, in the third plea, an allegation that "the plaintiff was in fact engaged in levying war against the government of the United States"; but this averment is too vague and general to be regarded by the court in any other light than as the conclusion or inference drawn by the pleader from his previous averments in the plea of specific facts. These averments are, that there was a secret political organization known as the Knights of the Golden Circle; that this organization was hostile to the government, and in close counsel and sympathy with the rebels, and a co-operating branch of the rebellion in the Northern states; that it was constantly planning and plotting with the rebels for the success of the rebellion; and that the plaintiff was an active member of said society at the county of Jo Daviess and state of Illinois, and deeply engaged in aiding it in its treasonable purposes, and was in fact levying war against the government in the county aforesaid.

On the familiar principle that a pleading is to be construed most strongly against the pleader, all that the court can intend from this plea is, that the plaintiff was an active member of a disloyal secret society at the North, whose purposes were treasonable, and whose object was to aid the rebellion, and that said society, and the plaintiff as one of its members, were holding counsel with the rebels and plotting for their success. The first special plea avers that the plaintiff was discouraging enlistments, but the foregoing is the one relied on, and comprises the substance of the defense. It will be observed that the offenses which this plea charges against the

plaintiff are laid as committed in the county of Jo Daviess and state of Illinois. It is also to be observed that the plea nowhere charges the plaintiff with being in the service of the rebel government, or with being in any manner connected either with the rebel army or the rebel government, except so far as, through his membership of this alleged disloyal society at the North, he and the rebels were working for a common purpose. But no act of co-operation is averred against him, nor is it alleged that he furnished information or supplies to the rebel forces. It is not averred that he took up arms against the government, or committed any overt act of war, or had ever done so. The substance of the plea is, that he was a domestic plotter against the government, in full sympathy with the rebels, and rendering them his moral co-operation and aid.

The plaintiff, if guilty of these offenses, merited not only the condemnation of all loyal and honorable men, but the severest legal punishment. On the 17th of July, 1862, which was prior to his arrest, Congress had passed a law designed to reach cases of this character. The act authorized imprisonment not exceeding ten years, and a fine not exceeding ten thousand dollars, in the discretion of the court to be pronounced against any person found guilty of giving aid and comfort to the rebels. Under this law a warrant might have been sued out in legal form against the plaintiff, by virtue of which the marshal could have arrested him and delivered him into the custody of the law for trial in the United States court for the northern district of Illinois. But do these offenses charged in these pleas make the plaintiff a belligerent, to be captured and held as a prisoner of war?

If the plaintiff was a belligerent, as insisted by the defendants' counsel, the order of the President was wholly unnecessary to authorize the arrest. Any soldier has the right, in time of war, to arrest a belligerent engaged in acts of hostility toward the government, and lodge him in the nearest military prison, and to use such force as may be necessary for that purpose, even unto death. This is the law of war, to which the defendants appeal for their justification. Have counsel considered to what this theory of belligerency among our own citizens would have led if reduced to practical application in the late war?

It is, however, a contradiction in terms to speak of a citizen of a loyal state, remaining in such state, and not engaged in

the war, as a belligerent. A belligerent is a subject of the hostile power, and his character in that regard depends upon that of the community to which he belongs. In the case of *Ex parte Milligan*, 4 Wall. 2, recently decided in the supreme court of the United States, the same point was made, and set at rest by the court in the following language:—

“ But it is insisted that Milligan was a prisoner of war, and therefore excluded from the privileges of the statute. It is not easy to see how he can be treated as a prisoner of war when he lived in Indiana for the past twenty years; was arrested there, and had not been, during the late troubles, a resident of any of the states in rebellion. If in Indiana he conspired with bad men to assist the enemy, he is punishable for it in the courts of Indiana; but when tried for the offense, he cannot plead the rights of war, for he was not engaged in legal acts of hostility against the government; and only such persons, when captured, are prisoners of war. If he cannot enjoy the immunities attaching to the character of a prisoner of war, how can he be subject to their pains and penalties? ”

This was the language of the majority of the court, speaking through Mr. Justice Davis; and although on another point there was a dissenting opinion, on this there was entire unanimity. It will be remembered that Milligan, having been charged with offenses of the same general character with those alleged against this plaintiff in the pleas, and tried before a military commission, and sentenced to be hanged, had presented a petition to the circuit court of the United States for the district of Indiana, praying for his discharge under the provisions of the act of Congress of March 3, 1863. By the express terms of the law, he was entitled to the benefit of its provisions or to his discharge under it if held as a prisoner of war. This question, then, lay at the foundation of the case. The majority of the court dispose of it in the words above quoted. The minority, speaking through the chief justice, use language on this point not less emphatic. They say: “ Milligan was imprisoned under the authority of the President, and was not a prisoner of war ”; and they held him entitled to his discharge under the act of Congress, as he would not have been if held as a belligerent or prisoner of war.

This is decisive authority as to whether the plaintiff in the present case can be considered as having been arrested and imprisoned as a belligerent or prisoner of war. The principle, indeed, had already been settled by the same court in the

Prize Cases, above quoted, where they held that all persons residing in the rebel states, whose property might be used to support the hostile power, were liable to be treated as enemies without reference to their personal loyalty. This is the settled doctrine,—that the *status* of any person as to the question of belligerency depends upon his citizenship or nationality. The late rebellion grew to such consistency and magnitude that our own as well as foreign governments recognized the people of the rebel states as belligerents, but the citizen and resident of a Northern state did not become a belligerent, whatever may have been his sympathies, or however wicked his plots.

So far, then, as it is sought to justify the arrest of the plaintiff by assuming that he was arrested as a belligerent and held as a prisoner of war, the argument is untenable. He was not a prisoner of war.

The foundation of the argument predicated upon the alleged belligerency of the plaintiff thus failing, it remains to be considered whether his arrest can be justified as an exercise of martial law applied to a citizen of Illinois, not in the military service. It is to be remarked that the order for the arrest of the plaintiff is alleged to have been issued by the President as commander-in-chief, through the judge advocate general of the armies of the United States, though addressed to and executed by the marshal of the northern district of Illinois, who is merely a civil officer. To what extent is martial law incident to a state of war?

As the phrases "martial law" and "military law" are sometimes carelessly used as meaning the same thing, it is proper to point out the broad distinction between them. The constitution authorizes Congress to raise and support armies, and to make rules for the government thereof. Acting under this authority, Congress has passed divers acts prescribing the rules and articles of war, and providing for the government and discipline of the troops. These rules constitute the military law, and are directly sanctioned by the constitution; but they apply only to persons in the military or naval service of the government.

What is called martial law, however, has a far wider scope and application. When once established, it is made to apply alike to citizen and soldier. To call this system by the name of law seems something of a misnomer. It is not law, in any proper sense, but merely the will of the military commander, to be exercised by him only on his responsibility to his gov-

ernment or superior officer. Sir Matthew Hale said (Hist. C. L. 54): "It is in truth and reality no law, but something indulged rather than allowed as law." In the famous Petition of Right in the reign of Charles I., it was solemnly enacted that no commission should issue to proceed in England according to martial law, and the principle was reasserted in the Bill of Rights of 1688. In the case of *Grant v. Gould*, 2 H. Black. 99, decided in the year 1792, Lord Loughborough said that martial law, in the sense in which we are now considering it, did not exist in England, was contrary to the constitution, and had been for a century totally exploded. We make these references merely to illustrate how odious this system is to the spirit of liberty and good government.

That martial law must be permitted to prevail on the actual theater of military operations in time of war, is an unavoidable necessity. It results from the very nature of war, which is simply an appeal to force; and where it is being waged, it necessarily suspends and displaces the ordinary laws of the land by those usages which are known as the laws of war. If a commanding officer finds within his lines a person, whether citizen or alien, giving aid or information to the enemy, he can arrest and detain him so long as may be necessary for the security or success of his army. He can do this under the same necessity which will justify him, when an emergency requires it, in seizing or destroying the private property of a citizen. The authority to do either by military force is indispensable on the actual theater of war. The want of such authority might lose a battle, or peril the issue of a campaign. The power to do these things is implied in the power to wage war, and springs from an overruling necessity.

This is the power of a military commander on the actual scene of military operations, and where hostile armies are confronted with each other. We may, for the purposes of the present case, go further, and admit that if in a district remote from the theater of military operations the popular sentiment is so disloyal to the government that one who aids and abets the public enemy cannot be rendered powerless for mischief, and brought to justice by the arm of the civil law, that fact would justify the government in treating such district as virtually attached to the theater of military operations, and in enforcing therein martial law or the laws of war, so far as might be necessary to the public safety. We may concede the right to do this as the exercise of a constitutional power, re-

sulting from the power to wage war. Whether this right belongs to the President as commander-in-chief, or whether he must receive authority thus to act from Congress, is a question not necessary for us to consider.

But beyond the enforcement of martial law on the actual field of military operations, which is the result of an overmastering necessity, and its establishment in districts which, though remote from the seat of war, are yet so far in sympathy with the public enemy as to obstruct the administration of the laws through the civil tribunals, and render a resort to military power a necessity, as the only means of restraining disloyalty from overt acts, and preserving the authority of the government, we know of no ground upon which its exercise can be defended. It is the result of an absolute necessity during a period of war, and should terminate with the necessity itself. The doctrine that a state of war of itself suspends, at once and everywhere, the constitutional guaranties for liberty and property, finds no support in the constitution, and is inconsistent with every principle of civil liberty and free government.

But the admission that the government, by the joint action of Congress and the President, or by the single action of the latter, may rightfully extend the limits of martial law beyond the actual theater of military operations, and establish it in districts where the civil authorities are powerless to protect the public welfare against disloyal persons, does not aid the pleas in the case before us. These pleas do not aver that the plaintiff was arrested where the war was raging, or that the civil courts were not in the peaceful and uninterrupted exercise of their jurisdiction, or that the civil authority was in any degree impaired, or that martial law had been proclaimed. Neither can we presume such a condition of affairs to have existed. Indeed, it is a part of the public history of the war, of which we may well take judicial notice, that no organized rebel force ever trod the soil of Illinois, that the usual administration of the laws in this state was at no time suspended or interrupted, and that in that part of the state where this arrest was made the people were eminently distinguished for their devotion to the government and to the prosecution of the war. Neither had there, at the time of this arrest, been any official action by any department of the government establishing martial law, or suspending the writ of *habeas corpus*, in the state of Illinois. We must assume, both from the absence of any aver

ment to the contrary in the pleas, and from the public history of the time, that this plaintiff might have been arrested by the ordinary legal process, and brought to trial before the ordinary civil tribunals, and if guilty, subjected without let or hindrance to a merited punishment.

In the face of all these facts, how is it possible to hold that the plaintiff was legally subjected to the administration of martial law?

It is undeniable, if the government had the right to arrest him without a warrant, and imprison without a trial or charge of any criminal offense, it had an equal right to send his case before a court martial or military commission. The right to do the one necessarily implies the right to do the other, because both rest on the same theory of power to be exercised by the government in time of war. If it was lawful to arrest and imprison the plaintiff without any form of judicial investigation, it would certainly have been not less lawful to do the same thing upon the finding and sentence of a military tribunal. It can hardly be said that the laws of war could be applied to the plaintiff for the purposes of punishment, but not for the purposes of trial.

That he could not have been legally brought to trial before a military tribunal has been recently decided by the supreme court of the United States in the case of *Ex parte Milligan*, 4 Wall. 2, already quoted. On the question whether Congress has the constitutional power to establish military tribunals and martial law in time of war, in districts where the war is not being actually waged, the court was divided. But on all those principles which govern the case now under consideration, there was entire unanimity. The majority held the imprisonment of Milligan illegal, and discharged him, on the ground that in a state where no war prevailed, and the jurisdiction of the civil courts was undisturbed, neither Congress nor President, nor both united, could constitutionally create a military tribunal or enforce martial law. The minority of the court, while they dissent from this proposition in its full extent, do nevertheless concur in the judgment of the court discharging Milligan, on the ground that Congress had not in fact authorized the creation of military tribunals in Indiana, and because the sentence of such a tribunal, passed upon Milligan, was void, and his imprisonment illegal. The power of the executive department to try and imprison Milligan by vir-

tue of the laws of war, and in the absence of congressional authorization, is thus directly denied by the entire court.

The majority of the court say: "Martial rule can never exist where the courts are open and in the proper and uninterrupted exercise of their jurisdiction. It is also confined to the locality of actual war. Because during the late rebellion it could have been enforced in Virginia, where the national authority was overturned, and the courts driven out, it does not follow that it should obtain in Indiana, where that authority was never disputed, and justice was always administered."

The majority of the court used the following language:—

"Congress cannot direct the conduct of campaigns, nor can the President, or any commander under him, without the sanction of Congress, institute tribunals for the trial and punishment of offenses, either of soldiers or civilians, unless in cases of a controlling necessity, which justifies what it compels, or at least insures acts of indemnity from the justice of the legislature.

"We by no means assert that Congress can establish and apply the laws of war where no war has been declared or exists.

"Where peace exists, the laws of peace must prevail. What we do maintain is, that when the nation is involved in war, and some portions of the country are invaded, and all are exposed to invasion, it is within the power of Congress to determine in what states or districts such great and imminent public danger exists as justifies the authorization of military tribunals for the trial of crimes and offenses against the discipline or security of the army or against the public safety."

As to the main fact that martial law did not lawfully exist in Indiana, and that the trial and imprisonment of Milligan were illegal, the court was not divided. That case is really decisive of the one before us. The case of Milligan was the weaker of the two, in this, that at the time of his arrest and trial in 1864, the writ of *habeas corpus* had been suspended by authority of Congress, which furnished the counsel for the government an argument in support of the theory of martial law.

A case involving in some degree the question of martial law arose in the supreme court of the United States in 1851: *Mitchell v. Harmony*, 13 How. 134. During the war with Mexico, Colonel Mitchell, acting under the orders of Colonel Doniphan, had seized the private property of Harmony, for

the service of the expedition, commanded by the latter officer. Harmony, who had been following the march of the army as a trader, after arriving in the Mexican province of Chihuahua, desired to stop there, but was compelled by the commander to accompany the expedition with his wagons, mules, and goods. The property was eventually lost, and an action was brought against Colonel Mitchell to recover its value. The defendant urged that it was seized and impressed into the public service from necessity, also to prevent it from falling into the hands of the enemy. The court on this point say:—

“There are, without doubt, occasions in which private property may lawfully be taken possession of or destroyed to prevent its falling into the hands of the public enemy, and also where a military officer charged with a particular duty may impress private property into the public service, or take it for public use. Unquestionably, in such cases the government is bound to make full compensation to the owner; but the officer is not a trespasser.

“But we are clearly of the opinion that in all these cases the danger must be immediate and impending, or the necessity urgent for the public service, such as will not admit of delay, and where the action of the civil authority would be too late in providing the means which the occasion calls for. It is the emergency which gives the right, and the emergency must be shown to exist before the taking can be justified.”

The court held the plaintiff entitled to recover.

The case of *Smith v. Shaw*, decided by the very able bench that constituted the supreme court of the state of New York in 1815, was a suit brought by a citizen against an army officer for false imprisonment during the war of 1812. The defense set up was that the plaintiff was a spy. The court said:—

“If he was an American citizen he could not be charged with such an offense. He might be amenable to the civil authority for treason, but could not be punished under martial law as a spy.”

It is urged that the power of the government to wage war is crippled unless it can arrest and imprison by military force disloyal persons. The necessity of arresting them is conceded, and where the civil law and civil tribunals have been rendered powerless, we concede the right to use such military force. But when the civil courts, in the midst of loyal communities, are exercising their ordinary jurisdiction, the appeal to the military arm or to martial law is needless. It is in the power

of Congress to enact laws which shall define offenses of this character, and bring to severe and merited punishment all persons guilty of aiding a public enemy. As already remarked, such a law was upon the statute-book when this plaintiff was arrested, and it is not alleged, either in plea or argument, that he could not have been brought to an impartial trial in the northern district of Illinois. If Congress should deem it necessary in time of war, it might go further, and enact that a person arrested by the civil authorities on a sworn charge of giving aid and comfort to the enemy should be held without bail until the meeting of the court and grand jury. It is not easy to see how the power of the government for successful war would be crippled, when furnished with such means of arresting disloyal persons, even though not able to arrest by means of military force in districts undisturbed by the war.

It is a fearful power that is claimed for the government by the counsel for the appellee, and one which no free government ought to possess. Even in England, in the latter part of the last century, when secret political societies were formed hostile to the government and in league with the French revolutionists, or supposed to be so, although the country was at war with France, yet, while the high Tory administration of Mr. Pitt arrested, prosecuted, and punished with a pitiless vigor, it acted only through the ordinary agencies of the civil courts, and made no use of the military arm under the pretense that the offending persons were belligerents or public enemies. If this plaintiff was guilty of the charges made in the plea he merited arrest and a severe punishment, but he should have been punished in conformity to law. It is to be remembered that the question before us is one of power simply on the part of the executive, and not of deserving on the part of the plaintiff. If the President could rightfully arrest him by military force, and consign him without process or trial to a fortress in the harbor of New York, he could do the same thing to any other person in the state of Illinois, however innocent of crime. This plaintiff may have been disloyal, and seeking to aid the rebels, but the most loyal citizen might have been arrested and sent away in the same summary manner. As no charge is made, no judicial investigation had, it is left entirely to the caprice of the government to determine what persons shall be seized. The power to thus arrest being once conceded, every man in the state, from the governor down to the humblest citizen, would hold his liberty at the mercy of the military

officer in command. For it is to be borne in mind that this power is not one to be exercised only by the highest officers of the government, in whose hands it might be exercised with moderation. It is claimed for the President, as commander-in-chief, and as incident to a state of war. But if it exists at all, it exists as the law of war or martial law, and may be exercised by the military officer in command of any district, without reference to his rank, as rightfully as by the President himself. He might be afraid to exercise it without orders from his superior, but if it exists at all, it belongs to him as well as to the President. This theory, then, pushed to its logical results, is this: That whenever the government is engaged in suppressing a rebellion in Florida, or waging war on the frontiers of Maine, martial law may be enforced in Illinois, where there is neither war nor public enemy, and where the courts are daily administering justice; and every citizen of the state shall hold his liberty and property at the whim and discretion of the military officer in command. The proposition thus stated in its nakedness may well startle us, when we remember how liable we are to be involved in war. But it is not true, for it is utterly at variance with the most cherished objects of the constitution and its most solemn prohibitions.

We are not unconscious of the fact that the decision which we are obliged to make in the present case on the facts appearing in the record attributes to our late lamented President the unlawful exercise of power, and therefore implies a certain degree of censure. None can have a higher appreciation than the members of this court of the unselfish patriotism and purity of motive of that great magistrate. If he exercised a power not given by the constitution, he undoubtedly did so under a full conviction of its necessity in the extraordinary emergencies wherein he was called to act. But neither our honor for his memory, nor our confidence in his honesty, can be permitted to sway our judgment here. The questions presented by this record must be decided by us as questions of abstract law. If this plaintiff has been wrongfully restrained of his liberty, he has the right to call upon us so to declare, without fear, favor, or affection. It is unfortunate that cases having a political or partisan character should come before the courts, but when they do so, we must declare the law as we believe it to exist. If we can know any other motive than the simple wish to truly expound it, or if, when our convictions are clear, we should hesitate to declare them without reference

to what party it may please or what offend, we should betray the solemn trusts which the people have committed to this court, and bring dishonor on the administration of justice.

Our attention has been called by the counsel for the defendants to two acts of Congress, the first of which, passed March 3, 1863, provides in its fourth section,—

“That any order of the President, or under his authority, made at any time during the existence of the present rebellion, shall be a defense in all courts to any action or prosecution, civil or criminal, pending or to be commenced, for any search, seizure, arrest, or imprisonment made, done, or committed, or acts omitted to be done under and by virtue of such order, or under color of any law of Congress; and such defense may be made by special plea, or under the general issue.”

The other act, passed May 11, 1866, provides in its first section that any arrest or imprisonment during the rebellion, by virtue of the order of the President, Secretary of War, or any military officer in command in the place where such arrest had been made or imprisonment had been inflicted, should come within the purview of the first act for all purposes of defense.

That it is the duty of Congress to indemnify out of the public treasury any person who has been compelled to pay damages for an act performed by him in good faith, under the command of the President, for the purpose of suppressing the rebellion, is a proposition which few persons would deny. But the denial by Congress, through a retrospective law, of all redress to a person whose property or liberty was illegally taken under a military order, is a mode of discharging obligations which, however convenient, is not reconcilable with the principles of the constitution. The constitution confides to Congress only legislative power, and that to be exercised only for specific purposes. When, therefore, it undertook to determine, in 1863 and 1866, that no injury to person or property committed prior to that time gave to the injured party a vested right of action, if committed under a military order, it assumed a judicial function which it is not authorized to perform. Whether this plaintiff was illegally arrested and imprisoned in 1862 depends solely upon the acts done and the laws in force at that time; and these are facts to be determined by judicial investigation, and facts which no act of Congress can change. If his personal liberty or property was illegally taken from him, then at once accrued to him a right to redress in

the courts, which no subsequent act of Congress can take away. The rights of person and property are equally secured by the constitutional provision, borrowed from Magna Charta, that no person shall be deprived of them without due process of law. That Congress has no power, by its own act, to divest these rights, is universally conceded, and we are unable to perceive the difference in principle between an act seeking to divest them directly, and one providing that where they have been divested by unlawful violence, no remedy shall be had against the wrong-doer. Suppose Congress should pass a law that no action should lie against United States marshals for any illegal acts theretofore done by them under color of their office, and a marshal should be sued for having, before the passage of the law, illegally taken the goods of one person under an execution against another. Can it be supposed such an act would be a defense to a suit brought for the trespass? And there is no difference in principle between such legislation and that now under consideration.

In 1862, on the facts disclosed by this record, one citizen of Illinois committed a trespass upon the rights of another for which the laws of Illinois then gave, and now give, a right of action. Since that time Congress has said the action shall not be maintained. We must respectfully ask, Whence comes the power to interfere with the remedies furnished by the state laws, through the state tribunals, for the injury of one citizen by another? There is really nothing to be said in support of this legislation. With all our respect for Congress, we must hold these acts beyond its constitutional authority. If they are not so, its power over persons and property is limited only by its own discretion, and constitutional government is merely a theory.

There remains to be disposed of a question of practice. As has been already stated, only a portion of the defendants pleaded the special pleas. After judgment against the plaintiff had been rendered on the demurrer, and he had elected to abide by his demurrer, the court, against his objections and at the instance of those defendants who had pleaded only the general issue, impaneled a jury to try that issue as to them. The plaintiff declined to offer any evidence, and thereupon the jury found a verdict for these defendants. The plaintiff contends that they were not entitled to a trial of this issue, which is final as to them, but that judgment should have been rendered in their favor on the demurrer to the special pleas of

their co-defendants, so that in the event the judgment of the court on the demurrer should be overruled, he might then have his recourse against all the defendants. The rule is stated by Tidd, page 895, as follows:—

“In actions of tort, as trespass, etc., where the wrong is joint and several, where the plea of one defendant is such as shows the plaintiff could have no cause of action against any of the defendants, it shall operate to the benefit of all the defendants, and the plaintiff cannot have judgment or damages against those who let judgment go by default; but when the plea merely operates in discharge of the party pleading it, then it shall not operate to the benefit of the other defendants.”

By this we understand that the defendant who has pleaded the general issue only may at his option claim the benefit of a judgment on demurrer in favor of his co-defendant who has pleaded specially, if such plea showed the plaintiff could not maintain his action against either. We do not understand, however, that he is obliged to do so. He has the right to insist on a trial of the issue made by his own plea, and the plaintiff cannot compel him to claim any benefit from the judgment on the demurrer.

In the present case the plaintiff, on the trial of the general issue, should have proved the trespass. If, under the rule quoted from Tidd, the defendants had sought to avail themselves of the judgment of the court on the special plea of their co-defendants, and the court had permitted it, the plaintiff could have excepted, and preserved against them in the record the same question raised by his demurrer to the special plea. If they had not sought to do this, but the evidence had failed to show their participation in the trespass, they would have been entitled to a verdict and judgment.

This judgment must be reversed and the case remanded. In order, however, that our decision may not be misconstrued, we deem it proper to add, that although the matter of the special pleas is not a bar to the action, yet on the trial the defendants will be permitted to prove the facts alleged in them in mitigation of damages, and for the purpose of rebutting the presumption of malice. For the purpose of enabling the jury to determine justly the *quantum* of damages to which the plaintiff may be entitled, the matters set up in these pleas will be, if proved, a proper subject of consideration.

Judgment reversed.

BREESE, J. I concur in much of the reasoning, and generally in the conclusions reached, in the above opinion. I cordially concur in the sentiment, that the constitution of the United States was designed by its framers, and has been hitherto so understood by the people, to be the same protecting instrument in war as in peace; that a state of war does not enlarge the powers of any one department of the government established by it, nor has any one of these defendants any right to urge "necessity," or "extraordinary emergencies," as a plea for the usurpation of powers not granted. The first is the tyrant's plea, and the other places the dearest rights of the citizen at the mercy of a dominant party, who have only to declare "the emergency," which they can readily create, pretexts for which bad men are keen to find and eager to act upon. There can be, and there should be, no higher law for the conduct of the government in its relations to the citizen than the constitution of the United States.

I cannot accede fully to the doctrine declared in the last clauses of the opinion. Holding as we do, that the executive order under which the defendants attempt to justify their conduct was illegal and void, it ought not to go in evidence for any purpose, — it is not in the case. A subordinate ought not to be permitted to extenuate his offense by the allegation, his superior ordered him to commit it. The marshal was not bound to execute the order, he knowing it was arbitrary and had not the sanction of the law. He should take all the consequences of his obedience.

In these disjointed times, under this ruling of the court, a jury might very easily be impaneled who would not assess more than nominal damages for one of the greatest outrages ever perpetrated in a country claiming to be governed by a written constitution and having a code of laws.

But I do not suppose pecuniary considerations influenced the plaintiff to bring this action, but rather to vindicate that constitution and the laws so grossly violated in his person. This he has effectually done, by the unanimous judgment of this court, in holding that the proceedings of which he complains were without any warrant of law, and in direct and palpable violation of the letter and spirit of the constitution.

At the September term, 1867, the appellant entered his motion that the foregoing opinion of the court be amended, so far as relates to the question of practice therein decided,

whereupon the court delivered the following additional opinion: —

The COURT. A motion has been made in this case by the appellant that the court amend the opinion filed herein, so far as relates to the question of practice on the trial of the general issue pleaded by a portion of the defendants. The motion is overruled. The proper practice is correctly stated in the opinion. As therein stated, the defendants who pleaded the general issue had the right to have that issue, as to them, tried, and by insisting on such trial, to disclaim any benefit they might have claimed from a mistaken ruling of the court on the special plea. Their co-defendants had no right, by pleading a defective special plea, to compel them also to rest their defense upon a plea which they did not file, and thus be made liable to be brought again before the court for trial by a reversal of the judgment on the special plea, which might be had at any time before the statute had barred a writ of error. An action of trespass is several as to each defendant, and each has a right to make his own defense and to have it tried, without being compelled to rely upon a defective defense made by a co-defendant. Counsel for appellant err in supposing they would not have been entitled to a judgment against the defendants who pleaded only the general issue if they had proved the trespass. When these defendants went to trial on that issue, declining to shelter themselves under the judgment of the court on the special plea, the court would have told the jury to find upon that issue only, and to assess the damages if they found the defendants guilty, and on that verdict the court would have rendered judgment. In remanding the case we reverse only the judgment on the demurrer. The judgment upon the verdict, as to those defendants who pleaded the general issue, and which is an entirely distinct and independent judgment, must stand.

We take this occasion to say that the opinion hitherto filed in this case, in which the court below is directed to receive evidence of the facts set up in the special plea in mitigation of damages and to rebut the presumption of malice, must be construed as referring to vindictive or exemplary damages.

Motion overruled.

MARTIAL LAW. — As stated in the principal case, there is a broad distinction between "martial law" and "military law," although the terms are often carelessly used as meaning the same thing. A confusion also exist-

ing between "martial law" and "military government" should be noted. "Military law" is the code of rules enacted for the government of the army and navy, and necessarily applies only to persons in the military or naval service, and not to civilians: Pomeroy's Constitutional Law, sec. 712; 1 Bishop's Criminal Law, sec. 44. "Military government" is the dominion exercised in war over the territory and inhabitants of an enemy's country upon its conquest and occupation: 2 Winthrop on Military Law, 38; Pomeroy's Constitutional Law, sec. 712; while "martial law" has been described to be "the suspension of all law, but the will of the military commanders intrusted with its execution, to be exercised according to their judgment, the exigencies of the moment, and the usages of the service, with no fixed or settled rules or laws, no definite practice, and not bound even by the rules of ordinary military law": Finlayson on Martial Law, 107; and in *United States v. Dickel-man*, 92 U. S. 520, 526, Waite, C. J., says: "Martial law is the law of military necessity in the actual presence of war. It is administered by the general of the army, and is in fact his will. Of necessity, it is arbitrary, but it must be obeyed." Compare 2 Winthrop on Military Law, 42, quoted *post*.

As held by the majority in *Ex parte Milligan*, 4 Wall. 2, 127, "martial law" is "confined to the locality of actual war," and "can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction"; but the opinion of the minority was to the effect that martial law was not necessarily limited to time of war, but might be exercised at other periods of "public danger," and that the fact that the civil courts are open is not controlling against its exercise, since they "might be open and undisturbed in the execution of their functions, and yet wholly incompetent to avert threatened danger, or to punish with adequate promptitude and certainty the guilty." This opinion of the minority has been considered the sounder and more reasonable one: 2 Winthrop on Military Law, 38. And the opinion of the majority has been otherwise criticised as confusing martial law with military government: Pomeroy's Constitutional Law, sec. 714; 2 Winthrop on Military Law, 39.

In the United States, the President unquestionably should proclaim martial law when occasion arises for its exercise, martial law being a means of waging war, and the President, as commander-in-chief, wages war: Pomeroy's Constitutional Law, sec. 714; 2 Winthrop on Military Law, 41.

It is said in the principal case that martial law, when once established, "is made to apply alike to citizen and soldier"; and in *United States v. Dickel-man*, 92 U. S. 520, 526, it is held that a subject of a foreign power, entering the territory governed by martial law, is under its control equally with citizens.

With regard to the limitations upon the exercise of martial law, Colonel Winthrop says: "The employment of martial law has been likened to the exercise of the right of self-defense by an individual. Its occasion and justification thus is necessity. But though in general without other limit than the discretion of the commander upon whom its execution is devolved, it is not an absolute power, but one to be exercised with such stringency only as circumstances may require. The often-quoted remark that martial law is simply 'the will of the general who commands the army,' is a description much less apposite in practice to martial law proper, or domestic martial law, than to that military government of enemies heretofore considered, and with reference to which in fact the observation was originally employed by Wellington. Martial law is indeed resorted to as much for the protection of

the lives and property of peaceable individuals as for the repression of hostile or violent elements. It may become requisite that it supersede for the time the existing civil institutions; but in general, except in so far as relates to persons violating military orders or regulations, or otherwise interfering with the exercise of military authority, martial law does not in effect suspend the local law or jurisdiction, or materially restrict the liberty of the citizen; it may call upon him to perform special service or labor for the public defense, but otherwise usually leaves him to his ordinary avocations. It is a principle of the exercise of martial law that even when required to be executed with exceptional stringency, and for a protracted period, it shall not be permitted to serve as a pretext for license or disorder on the part of the military; and acts of undue violence and oppression committed in its name will, by the laws of war, be visited with extreme punishment. It is a further principle that while martial law is not to be inaugurated precipitately or inconsiderately, so it is to be continued only so long as the public exigency, on account of which it was declared, shall prevail. It is not indeed essential to the discontinuance of such state that the original declaration of the same be formally revoked; when the emergency has ceased, or within a reasonable interval thereafter, the *status* may be deemed to have elapsed, and cannot lawfully be further continued or enforced": Winthrop on Military Law, 42.

LIABILITY OF OFFICER, SOLDIER, OR CITIZEN FOR ACTS DONE UNDER MILITARY AUTHORITY: See *Witherspoon v. Farmers' Bank*, 87 Am. Dec. 503; *Christian County Court v. Rankin*, 87 Id. 505, and note; *Taylor v. Jenkins*, 88 Id. 773; *Jones v. Commonwealth*, 89 Id. 605; *Farmer v. Lewis*, 89 Id. 610, and note; *Price v. Poynter*, 89 Id. 631; *Bell v. Louisville etc. R. R.*, 89 Id. 632; *Riggs v. State*, 91 Id. 272.

BELLIGERENT RIGHTS: See *Cochran v. Tucker*, 91 Am. Dec. 276, and note discussing the subject.

THE PRINCIPAL CASE WAS ADOPTED AS DECISIVE of the identical cases of *Sheean v. Jones*, 44 Ill. 167; *Carver v. Jones*, 45 Id. 334; it is also followed in *Wells v. Miller*, 45 Id. 384, in holding that where one of several defendants in trover was acquitted and the others found guilty, an appeal by the latter and reversal of the judgment as to them will not affect the judgment of acquittal in favor of the former; and cited in *Cochrane v. Tuttle*, 75 Id. 365, to the point that in an action on the case by the plaintiff for being wrongfully shut out of a house, a portion of which the plaintiff claimed to have rented of the defendant, evidence by the defendant that he acted upon competent legal advice in what he did is admissible, not in bar of the action, or in mitigation of actual damages, but in mitigation of vindictive damages.

HALTY v. MARKEL.

[44 ILLINOIS, 225.]

AGISTER IS BOUND TO EXERCISE ONLY REASONABLE CARE AND DILIGENCE FOR SAFETY OF STOCK committed to his charge; and whether or not he has done so is a question for the jury to determine, in view of all the testimony before them.

AGISTER IS BOUND TO EMPLOY SKILLFUL, CAREFUL, AND TRUSTWORTHY SERVANTS, and is liable for all injuries done by them in the course of

their employment, through negligence or carelessness, but not for any willful or malicious injury committed without his knowledge or consent. INSTRUCTIONS TO JURY ARE NOT REQUIRED TO BE REPEATED by the court below, although stated in different language from those given, and containing correct legal propositions.

ACTION by Ludwig Markel against George Halty to recover the value of a colt killed while on the premises and in the possession of the defendant. The facts are stated in the opinion.

J. I. Taylor, for the appellant.

Stipp and Gibbons, for the appellee.

By Court, WALKER, J. This was an action originally commenced by appellee before a justice of the peace of Bureau County against appellant for the value of a colt killed while on the premises and in the possession of appellant. A trial was had before the justice of the peace, resulting in a judgment in favor of appellee, from which an appeal was prosecuted to the circuit court of Bureau County. A trial was afterward had in that court, resulting in a verdict in the same way. A motion for a new trial was entered and overruled, and a judgment rendered on the verdict. The case is brought to this court by appeal, and it is urged in favor of a reversal that the verdict is not sustained by the evidence, and that the court gave the jury improper instructions.

It appears that appellant agreed to pasture a number of colts for appellee; that at the time the agreement was made appellant said he would build a fence around the pasture, and when it was done he would let appellee know. After getting the fence partly done he told Jacob Markel that he could put the colts in the pasture and he would finish the fence that afternoon. Jacob Markel, appellee, and hired men put the colts in the pasture, but the fence was not completed as agreed. One of appellee's colts was injured and died while on appellant's premises. The evidence seems to concur that the colt was killed by jumping the fence, and at a point where it was sufficient to turn any but breachy stock. It also appears that this and other colts and some calves had got out of the pasture into appellant's wheat-field, and that his hired men and son were engaged in putting them back into the pasture when the injury occurred.

It is insisted that the colt was killed by the negligent manner in which it was put back into the pasture, and that appel-

lant is rendered liable by reason of such negligence. There was evidence that the son of appellant was dogging the colt at the time. On the other hand, his hired men testify that the son was driving the calves, and some distance from the colt, and that it was not dogged; that they were turning the colts from the wheat-field into the pasture; had opened the fence so the colts could pass through; that all had gone through but this one, which jumped the fence. They say they did nothing to frighten the colt. In this conflict of evidence, it was for the jury to reconcile it if they could; and if that could not be done, they were required to consider all the circumstances relating to the witnesses, and give such weight to it as they believed it was entitled to receive, to reject such as they believed to be unworthy of belief, and find their verdict on the balance.

Under this contract of bailment, appellant was bound to exercise reasonable care and diligence for the safety of the colt. Story, in his treatise on bailment, section 443, says it has been decided that agisters of cattle are within the general rule; that they do not insure the safety of the cattle agisted, but they are merely responsible for ordinary negligence; that it will be such negligence if an agister or his servants leaves open the gates of his fields, and the cattle, in consequence of such neglect, stray away and are stolen; and he will be responsible for the loss. This, then, imposed upon appellant the duty of exercising ordinary care, by himself and his servants. If he has failed in this, he is liable; but if not, then the loss must fall upon appellee. And this was a question for the jury to determine, in view of all the testimony before them.

The same author says, section 402, that the master is not universally liable for the misdeeds of his servants; that we must therefore distinguish between the acts of the servant done in his service, or in obedience, and those which are not; for in the former cases only is the master responsible; that the master is not responsible for any willful or malicious injury done by his servant, without his knowledge or consent, but only for injuries done by the servant in the master's service in the course of his employment. The master is bound to employ skillful, careful, and trustworthy servants, as he must be held liable for their careless and negligent acts. It was therefore a question for the jury to determine whether the persons performing the act were appellant's servants, engaged in the prosecution of his business; and whether the act was negligently or carelessly performed by them, or whether it was willful or

malicious. And having determined these questions, they were then required to find their verdict according to these rules.

Were the jury, then, properly instructed as to the law of the case? An agister for hire is clearly bound to exercise ordinary care for the safety of stock committed to his care; and when he undertakes to pasture such stock, unless it is otherwise understood by the parties, he should furnish reasonably good pasture. Failing to either exercise ordinary care in maintaining reasonably good fences to keep the stock in, or to furnish such pasturage as is necessary to keep stock, would be negligence, and would render him liable for the immediate damages occasioned by stock escaping by reason of such negligence. This is what is announced by appellee's first instruction. Nor is any objection perceived to the second instruction. Nor do we see that the third and fourth instructions contravene the principles which we have seen should govern the case.

A careful examination of the instructions asked by appellant does not disclose the fact that they were improperly modified before they were given. When modified, they harmonized with those given for appellee. The fifth instruction asked by appellant and refused by the court asserted that if appellant undertook to pasture the colt for him, and promised appellee that he would put the fence around the pasture in proper repair to keep the colt within; and appellee relied upon such promise, and was induced by such promise to put his colt in the pasture; and that the want of such a repaired fence was the immediate and not the remote cause of the accident to the colt,—then appellant would be liable. We are unable to see that this instruction announces any rule or principle not contained in the instructions already given. And this court has repeatedly held that the court below is not required to repeat instructions to the jury; that having announced a rule to them it need not be repeated, although stated in different language. Although this instruction may contain correct legal propositions, still they had already been announced in instructions given, and it was not error to refuse it. The judgment of the court below must be affirmed.

Judgment affirmed.

AGISTER IS BOUND TO EXERCISE BUT ORDINARY CARE, and is not an insurer of the safety of the animals committed to his charge: *Rey v. Toney*, 69 Am. Dec. 444; *Winston v. Taylor*, 75 Id. 112; and see *Cecil v. Preuch*, 16 Id. 171; *Owens v. Gelger*, 22 Id. 435.

COMPENSATED BAILMENTS REQUIRE EXERCISE OF BUT ORDINARY CARE: *Foster v. Essex Bank*, 9 Am. Dec. 168; *Smith v. Nashua etc. R. R.*, 59 Id. 364; *Conner v. Winton*, 65 Id. 761; *Swann v. Brown*, 72 Id. 555.

MASTER IS LIABLE FOR TORTIOUS ACTS OF SERVANT IN COURSE OF HIS EMPLOYMENT: *Donaldson v. Mississippi etc. R. R.*, 87 Am. Dec. 391, and note; *Yates v. Squires*, 87 Id. 418, and note; *Chapman v. New York Central R. R.*, 88 Id. 392.

POPPEL v. HOLMES.

[44 ILLINOIS, 360.]

TOWN CANNOT BY ITS BY-LAWS CONFER AUTHORITY UPON ITS OFFICERS TO MAKE SALES OF IMPOUNDED ANIMALS, except for penalties incurred and the costs of the proceedings, under the Illinois act of 1861 empowering the electors of towns at their annual town meetings to restrain or prohibit the running at large of certain animals, and to authorize the distraining, impounding, and sale of the same for penalties incurred and the cost of the proceedings.

TO ASCERTAIN WHETHER PENALTY HAS BEEN INCURRED IN PROCEEDING PURELY JUDICIAL in its character, and the power cannot be exercised by the pound-master by virtue of his office, under the Illinois act of 1861 empowering the electors of towns at their annual town meetings to restrain or prohibit the running at large of certain animals, and to authorize the distraining, impounding, and sale of the same for penalties incurred and the cost of the proceedings.

TOWN CANNOT BY ITS BY-LAWS AUTHORIZE POUND-MASTER TO SELL PROPERTY without a judicial ascertainment that some law has been violated.

REPLEVIN by Israel B. Holmes against Alfred Poppen to recover a horse. The defendant claimed the horse by virtue of a sale by the pound-master of the town of Ridott, Stephenson County. The horse had been impounded because running at large in violation of the town by-laws, and had been advertised for sale by the pound-master the day after impounding, "in satisfaction of fine and costs of proceeding," and sold without any judicial proceedings before a magistrate prior to the sale. The by-laws of the town prohibited the running at large of certain animals, under a penalty provided for their impounding if found running at large; and then read: "Sec. 6. On receiving any animal or animals into the pound, as above directed, the pound-master of the town shall give immediate notice thereof to the owner or bailee of said animals, if known, and request said owner or bailee to pay the costs and charges of distraining, impounding, and taking care of said animal or animals, and all lawful fees of the pound-master, and take them away; and in case the owner or bailee of said animal or animals so impounded, within six hours after

such notice is given to him, her, or them, fails or neglects to take away said animal or animals, and also to pay all costs and charges of taking up, impounding, and taking care of said animal or animals in the pound, together with the lawful fees of the pound-master in respect to said animals, then such animal or animals shall be sold by the pound-master as provided in the next succeeding section of these by-laws." "Sec. 7. Whenever the pound-master of this town shall receive into the pound any animal or animals according to the preceding section of these by-laws, and shall have given the notice required in the next preceding section, and the owner or bailee of such animal or animals fails to pay the charges and costs in the next preceding section mentioned, and take such animal or animals away within the time required in said section, then it shall be the duty of the pound-master forthwith to advertise and sell said animal or animals so impounded at public auction to the highest bidder for cash in hand, and out of the proceeds of sale to pay all the costs and charges of taking up, impounding, and taking care of said animals in the pound, together with his fees in respect to the same, and the balance, if any there be, he shall pay to the owner of the animal or animals sold as aforesaid. The sale of any animal or animals impounded under the provisions of these by-laws shall be conducted as near as may be according to the law regulating sales of property by constables under execution from justices of the peace." The judgment was for the plaintiff, and the defendant appealed.

Meacham and Cochran, for the appellant.

Bailey and Brawley, for the appellee.

By Court, LAWRENCE, J. The question presented by this record is, whether the sale of appellee's horse by the pound-master of the town of Ridott divested the title of the owner. The horse had been impounded because running at large in violation of the town by-laws. There were no judicial proceedings before a magistrate prior to the sale, but the pound-master the day after impounding the animal advertised it for sale, "in satisfaction of fine and costs of proceeding."

The authority of towns upon this subject is derived from the following statute:—

"The electors of each town shall have power, at their annual town meetings, . . . to restrain or prohibit the running at large of cattle, horses, mules, asses, hogs, sheep, or goats; to

authorize the distraining, impounding, and sale of the same for penalties incurred and the cost of the proceedings, and to determine the time and manner in which such animals may go at large": Sess. Laws 1861, pp. 221, 222.

It will be observed that the power to make sales is given only for penalties incurred, and the cost of the proceedings; and a town cannot by its by-laws confer such authority upon its officers in any other contingency. But to ascertain whether a penalty has been incurred or not is a proceeding purely judicial in its character, and that power cannot be exercised by the pound-master by virtue of his office. The by-law may impose a reasonable penalty for the offense of allowing animals to run at large, may authorize the animals to be impounded, and may direct an inquiry to be had before a magistrate as to whether the penalty has been incurred, with a right of trial by jury. If it has been incurred, the magistrate may be directed to enter a judgment against the owner for the penalty and costs, and an order directing the pound-master to sell the property. If the owner is known, he should receive personal notice, and if not known, there may be constructive notice to him as the unknown owner of the impounded property, by posting, the property being described in the notices. A by-law thus framed would be free from objection; but one which authorizes the pound-master to sell property without a judicial ascertainment that some law has been violated would confer upon the pound-master a species of power never contemplated by the statute above quoted, to say nothing of constitutional objections to its exercise.

Judgment affirmed.

ORDINANCE AUTHORIZING SUMMARY SEIZURE AND SALE OF ANIMALS RUNNING AT LARGE IS VOID: Note to *Robinson v. Mayor etc. of Franklin*, 34 Am. Dec. 640; *Donovan v. Mayor etc. of Vicksburg*, 64 Id. 143; and see note to *Flint River Steamboat Co. v. Foster*, 48 Id. 276. The principal case is cited in *Willis v. Legris*, 45 Ill. 293, to the point that to ascertain whether a penalty under a city ordinance for suffering horses to run at large has been incurred or not is a proceeding judicial in its character, and cannot be determined by the pound-master; and it is explained in *Owners of Lands v. People ex rel. Stookley*, 113 Id. 312, in that the proceeding in question in it was directly to divest title, and therefore necessarily must be supported by an adjudication.

CUMINS v. WOOD.

[44 ILLINOIS, 416.]

BAILLEE IS PRESUMED TO HAVE BEEN NEGLIGENT, AND BURDEN OF PROOF RESTS UPON HIM of showing the exercise of such care as was required by the nature of the bailment, in case of compensated, as well as in gratuitous bailments, where the bailor shows, in an action against the bailee to recover damages for an injury to or loss of the goods bailed, that the goods were placed in the hands of the bailee in good condition, and that they were returned in a damaged state, or not at all.

CASE by William Wood against Cumins and King. The facts are stated in the opinion.

Williams and Thompson, for the appellants.

Hiram M. Chase, for the appellee.

By Court, LAWRENCE, J. The only question of law in this record is as to where lies the burden of proof as to the fact of negligence in an action brought by a bailor against a bailee in whose hands the goods have suffered injury. The counsel for appellants, while admitting the authorities to be in conflict, insist that the weight of authority would throw the burden on the bailor. We held the opposite rule to be the more reasonable one in the case of *Bennett v. O'Brien*, 37 Ill. 250, and we are not inclined to depart from that decision. That, it is true, was a case of gratuitous bailment, but the reason of the rule applies as well to a bailment for hire. That was a case of a borrowed horse injured while in the possession of the borrower. The present suit is brought by a person who had stored furniture with the defendants at such rates of storage as the defendants asked, and which rates were paid by the plaintiff, and when the latter demanded his goods, a part of them were restored to him in a damaged condition, and the carpets were not returned at all. Now, in cases of this sort it would be very difficult for the plaintiff to show in what way the injury and loss had occurred, or that they had occurred by the actual negligence of the defendants, or their employees. The plaintiff would not know what persons had been engaged in the defendants' warehouse, nor where to find the testimony necessary to support his action. On the other hand, the defendants would know, or ought to know, what persons had had access to the goods, and could easily show that proper care had been exercised in regard to them, if such was the fact. For this reason we hold it the most reasonable rule, when the bailor has shown he stored the goods in good condition, and they were returned

to him in a damaged state, or not returned at all, that the law should presume negligence on the part of the bailee, and impose on him the burden of showing he has exercised such care as was required by the nature of the bailment.

In the present case, perhaps the presumption of negligence was sufficiently rebutted by the evidence in regard to the fire as to all the goods except the carpets. But no explanation is made in regard to these. The defendants themselves prove that the firemen took away none of the goods, and that they were in the fourth story, where no person but the employees of the defendants had access to them. The fire only burnt a hole in the floor, and no attempt is made to prove that the carpets were destroyed by the fire. The presumption from the proof is, if the carpets were not taken away by an employee of the defendants, that they were taken by some person to whom the defendants improperly permitted access to the place where the goods were kept. The verdict did not exceed the value of the carpets, and we see no reason for reversing the judgment.

Judgment affirmed.

BURDEN OF PROOF AS TO NEGLIGENCE OF BAILEE IN CASE OF LOSS OR INJURY: See *Beardslee v. Richardson*, 25 Am. Dec. 596, and note; *Mills v. Gilbreth*, 74 Id. 487. The principal case is cited in *Funkhouser v. Wagner*, 62 Ill. 60, to the point that where goods are placed in the hands of a bailee in good condition, and are returned in a damaged state, or not at all, in an action by the bailor against the bailee, the law will presume negligence on the part of the latter, and impose on him the burden of showing that he exercised such care as was required by the nature of the bailment.

GOLD v. BAILEY.

[44 ILLINOIS, 491.]

EQUITY WILL NOT LEND ITS AID TO SECURE BENEFIT OF DEFENSE AVAILABLE AT LAW, which the party neglected to interpose.

EQUITY WILL NOT RESTRAIN COLLECTION OF JUDGMENT AGAINST ADMINISTRATOR AT SUIT OF HEIR, on the ground that a release of the claim on which the judgment was recovered had been executed to the deceased in his lifetime, no excuse being shown why such release was not interposed as a defense at law, and no fraud or collusion on the part of the administrator being alleged.

EXECUTOR OR ADMINISTRATOR MUST BE RECOGNIZED AS SOLE REPRESENTATIVE OF DECEASED, both as to debts and assets, so long as he retains his office; and a judgment against him, to be paid in due course of administration, will, in the absence of fraud, bind the personal estate.

ADMINISTRATOR WHO HAS BEEN DELINQUENT IN DUTY IN NOT INTERPOSING AVAILABLE DEFENSE AT LAW IS LIABLE to the heirs on his bond; but persons holding claims against an estate will not be compelled to litigate them first with the administrator and then with the heirs, upon the same point or points which might have been investigated in the first case.

MERE FACT THAT PARTNERSHIP ONCE EXISTED DOES NOT, IT SEEMS, RENDER VOID JUDGMENT obtained in the county court of Illinois by the administrator of one partner against the administrator of the other. If the defendant chose to submit to the jurisdiction, the power of the court to pronounce a judgment for the balance it might find due cannot be denied on the ground that that court has no jurisdiction in matters of partnership.

BILL in chancery. The facts sufficiently appear in the opinion.

McClelland, Broadwell, and Springer, for the plaintiffs in error.

J. G. Bowman, for the defendant in error.

By Court, LAWRENCE, J. This was a bill in chancery filed by one of the heirs of Thomas Bailey, deceased, against the administrator and heirs of J. C. Riley, deceased, to enjoin the collection of a judgment obtained in the circuit court by the administrator of Riley against the administrator of Bailey, and directed to be paid in due course of administration. The sole ground upon which relief is sought is, that in February, 1848, some years before the commencement of the proceedings in which the judgment was recovered, and while Bailey was still living, the heirs of Riley executed to him a release of all claims, including those upon which the judgment in controversy was recovered. There is a further averment that the heirs of Riley have the sole interest in the judgment as distributees, the proceeds not being required to pay debts.

The case was heard on bill, answer, replication, and proofs, and the court made the injunction perpetual.

The proof tends to show that the release of the 14th of February, which is the only one which covers all claims against Bailey, was fraudulently obtained. But we waive that question, as there is another objection to this decree that is clearly fatal. There is no attempt to show, either by bill or proofs, why this release was not interposed as a defense on the trial of the suit at law. It is not claimed that the administrator of Bailey had no knowledge of the release during the pendency of that suit, and there is no explanation of any kind offered

for this laches. If parties have a defense available at law, as in this instance, they cannot invoke the aid of a court of chancery in order to secure its benefit. They have already had their day in court. Against such laches the courts will give no relief. This is so familiar a principle of chancery as hardly to need the citation of authorities: *Armstrong v. Caldwell*, 2 Scam. 419; *Elston v. Blanchard*, 2 Id. 421.

This bill, it is true, is filed by one of the heirs of Bailey, and not by his administrator. But the judgment was duly obtained against the administrator, who was the legal representative of the deceased, and it is not alleged that he acted fraudulently or collusively. That judgment binds the personal estate, in the absence of fraud. If the administrator has been delinquent in his duties, the heirs have their remedy on his bond, but the practice cannot be tolerated of compelling persons holding claims against estates to litigate them, first with the administrator, and then with the heirs, upon the same point or points which might have been investigated in the first case. This would lead to endless confusion. The administrator is the sole representative of the personal estate, and relief is not sought here on the ground that he is seeking to subject the real estate to the payment of debts, or that it will be necessary to do so. Should he file a bill for that purpose, the heirs, as decided in *Hopkins v. McCann*, 19 Ill. 113, and *Stone v. Wood*, 16 Id. 177, can contest this judgment and set up the release. But there is nothing whatever in this bill to justify this application to the court by the complainant as one of the heirs. It does not appear that the part of the estate which descended to him is or will be affected by this judgment. If we were to sanction this proceeding, it would follow that whenever a claim is allowed against an estate, an heir would have the right at once to file a bill for the purpose of relitigating it, though not averring fraud or collusion on the part of the administrator. So long as an executor or administrator retains his office, he must be recognized as the sole representative of the deceased, both as to debts and assets.

It is said Bailey and Riley were partners, and the county court where the suit was commenced, in which the judgment was obtained, had no jurisdiction in matters of partnership. It was not perhaps the most appropriate tribunal for adjusting partnership accounts; but the mere fact that a partnership had once existed does not render void a judgment obtained by the administrator of one partner against the

administrator of the other. If the defendant chose to submit to the jurisdiction, we cannot deny the power of the court to pronounce a judgment for the balance it might find due. But on this point it is sufficient to say the bill does not seek relief on this ground, but solely on account of the release. The decree must be reversed, and the cause remanded.

Decree reversed.

EQUITY WILL NOT RELIEVE AGAINST JUDGMENT AT LAW, where the complainant neglected to make an available defense: *Baxter v. Dear*, 76 Am. Dec. 89, and note collecting prior cases.

JUDGMENT AGAINST ADMINISTRATOR OR EXECUTOR, WHETHER BINDS ASSETS: See *Ewing v. Handley*, 14 Am. Dec. 140. The principal case is cited in *Darling v. McDonald*, 101 Ill. 377, to the point that a judgment against executors, to be paid in the due course of administration, binds the assets in the hands of the executors.

FREEMAN v. HARTMAN.

[45 ILLINOIS, 57.]

PERSON STANDING IN LOCO PARENTIS TO ANOTHER OCCUPIES SUCH RELATION as will require him to show that there was no fraud used or undue advantage taken by him in a transaction whereby his ward conveyed to him her interest in certain real property for less than one fourth of its real value.

VOLUNTARY CONVEYANCE BY WOMAN, UPON EVE OF HER MARRIAGE, of property known by her intended husband to be hers, if made without his knowledge, is void as against him, because in derogation of his marital rights and just expectations.

INADEQUACY OF CONSIDERATION FOR CONVEYANCE IS NOT ALONE SUFFICIENT GROUND for setting it aside.

ESTATE BY CURTESY OF HUSBAND IN WIFE'S REALTY, though modified by the Illinois married woman's act of 1861, is not, by that act, entirely destroyed.

BILL in equity. The opinion states the facts.

Frost and Tunnickliff, for the appellant.

Lamphere and Price, and *J. B. Boggs*, for the appellees.

By Court, LAWRENCE, J. This was a bill in chancery, filed by James T. Hartman and his wife, Henrietta Hartman, to set aside a deed made by her to her brother, Benjamin F. Freeman, the appellant herein, in November, 1862, three days before her marriage to Hartman. The deed conveyed, upon a consideration of two hundred dollars, her undivided interest in the farm formerly owned by her father, and since his death

occupied by the widow and children. Her interest is shown by the proof to have been worth, at the time of the conveyance, between eight hundred dollars and nine hundred dollars. The bill seeks a rescission of the deed on the ground of constructive fraud by the brother towards his sister, and also because the conveyance was in fraud of the marital rights of the husband. The case came on to a hearing upon bill, answer, replication, and proofs, and the court decreed a rescission of the conveyance on the return of the purchase-money and interest, and also payment of rent. The defendant appealed.

It appears that the father, Fauntleroy Freeman, left at his death a widow and seven children, of whom the appellant, Benjamin, was the eldest. He was at that time not quite twenty-one years of age. His sister Henrietta, now Mrs. Hartman, complainant in this suit, was about nineteen. From the death of the father in 1856, to the marriage of Mrs. Hartman in 1862, the family continued to live together on the paternal farm, which was managed by Benjamin. They seem from the evidence to have lived harmoniously, and to have all contributed by their industry to the common welfare, Benjamin being the recognized head and manager of affairs abroad, and the mother and daughters performing the domestic labors. Mrs. Hartman was, for a part of the time, engaged in teaching, and the witnesses called by the appellant show she did much of the family sewing. The attempt, therefore, of the appellant, to explain the low price he paid her for her interest in the farm, by setting up an indebtedness against her for her board and clothing, must be considered as failing. We must consider these expenses abundantly compensated by her personal services and her interest, as one of the heirs, in the profits of the farm. It appears, from the testimony of the mother, who was called as a witness by the appellant, that the deed to him was executed at his suggestion, and the reason then given was, that trouble might be avoided in future. As the appellant must be regarded from the evidence in the record as having stood to his sister *in loco parentis*, we are inclined to the opinion that the conveyance to him of his sister's interest in the farm for less than one fourth of its value requires an explanation which he has failed to give.

We do not, however, place our disposition of the case on that ground.

It is a settled rule that a voluntary conveyance by a woman, on the eve of her marriage, of property which her intended

husband knew her to own, made without his knowledge, is void as against him, because in derogation of his marital rights and just expectations: *Strathmore v. Bones*, 1 Ves. 22; *England v. Downs*, 2 Beav. 522; *Logan v. Simmons*, 3 Ired. Eq. 487; *Tucker v. Andrews*, 13 Me. 125; 1 *Bright's Husband and Wife*, 221, and cases there cited. The case before us falls within this principle. The deed was made but three days before the marriage, and without the knowledge of Hartman, the intended husband. The conveyance, it is true, was not strictly voluntary, but it was made upon a consideration less than one quarter of its real value, to a person standing to the grantor in a relation of trust and confidence, and for the avowed reason that thereby future trouble would be avoided, by which it must have been meant that after the marriage the husband would probably not consent to such a disposition by his wife of her interest in the paternal farm. If such a conveyance had been made to some person occupying no position that would enable him to exercise an undue influence over the grantor, and upon a purchase in good faith, without reference to the intended marriage, the inadequacy of the consideration would not be a sufficient ground for setting the deed aside. But in the actual circumstances of this case, the deed having been evidently made in order to secure an inequitable advantage to the grantee, and because the husband's consent to such a sale could not be expected after marriage, we must hold the transaction to be as much a fraud in principle upon his marital rights as if the conveyance had been purely voluntary. Such a proceeding cannot be placed beyond the reach of a court of equity by attempting, through the payment of one fourth of the value of the property, to give to the deed the color of a *bona fide* sale. If the transaction had not been regarded as unjust to the intended husband, it would hardly have been kept from his knowledge.

It is urged by counsel for the appellant that under the law of 1861, known as the married woman's law, the husband would have acquired no interest in his wife's land, even if she had not conveyed it, and therefore the deed was no fraud upon his marital rights. But a majority of the court have held in the case of *Cole v. Van Riper*, 44 Ill. 58, that that law is not to be construed as destroying the curtesy of the husband in his wife's realty.

The decree of the circuit court must be affirmed.

Decree affirmed.

BREESE, C. J. I did not concur in the decision of *Cole v. Van Riper*, 44 Ill. 58, in which it is held a wife cannot convey her land without the assent of her husband, he being entitled to a life estate therein, and may become a tenant by the curtesy. Having such rights, it seems to me clear a woman owning land, who in contemplation of marriage conveys it away, does so in fraud of the marital rights of her intended husband, and the conveyance is void: 1 Bright's Husband and Wife, 221, 222.

This decision is, it seems to me, a necessary sequence of the case of *Cole v. Van Riper*, *supra*.

WALKER, J. I concur in the legal principles announced in this case, but do not concur in holding the conveyance fraudulent in fact. From the whole record, I think we may infer that it was made to carry out a previous understanding of the parties.

RIGHTS AND LIABILITIES OF PERSONS STANDING IN LOCO PARENTIS: See *Williams v. Hutchinson*, 53 Am. Dec. 301, and note; and *Bartley v. Rickmeyer*, 53 Id. 338, and note 345.

INADEQUACY OF CONSIDERATION IS NOT ALONE SUFFICIENT GROUND FOR SETTING ASIDE CONVEYANCE: See *Davidson v. Little*, 60 Am. Dec. 81, and note.

THE PRINCIPAL CASE WAS CITED and adopted as the basis of the decision in *Freeman v. Dunn*, 45 Ill. 61, a case arising out of the same or similar facts.

CHICAGO v. RUMPF.

[45 ILLINOIS, 90.]

CITY ORDINANCE IS UNREASONABLE, IN RESTRAINT OF TRADE, tends to create a monopoly, and is therefore void, which limits the slaughtering of animals for food, except for packing purposes, to one particular lot of land in the city, owned by one firm, and forbids slaughtering to be done elsewhere under a penalty; and this notwithstanding the ordinance was passed ostensibly as a sanitary regulation, and the charter of the city empowers it to "regulate license, restrain, abate, and prohibit" slaughter-houses.

CITY MAY PROHIBIT SLAUGHTERING OF ANIMALS IN CITY LIMITS, or may restrict it to designated localities in the city, and prohibit it in others, provided, that in designating a particular quarter for this purpose, it leaves all persons equally free, both to slaughter animals in that quarter and to furnish and rent the places where the animals are slaughtered.

STATUTE PASSED SUBSEQUENT TO ENACTMENT OF INVALID CITY ORDINANCE, purporting to empower the common council to enforce "any regulation, contract, or law heretofore made upon the subject" concerning which the ordinance deals, but not naming the particular ordinance in question, is not in itself a confirmation of the ordinance so as to validate it.

ACTION to recover penalties for violation of a certain ordinance. The opinion states the facts.

A. W. Arrington and S. A. Irwin, for the appellant.

Beckwith, Ager, and Kales, and Scammon, McCagg, and Fuller, for the appellees.

By Court, WALKER, J. As these cases present the same questions, they will be considered together in this opinion. It appears that the general assembly granted to the city of Chicago in its charter power to "direct the location and management of, and to regulate and license, breweries, tanneries, and packing-houses, and to direct the location, management, and construction of, and to regulate, license, restrain, abate, and prohibit within the city, and the distance of four miles therefrom, distilleries, slaughtering establishments, establishments for steaming or rendering lard, tallow, offal, and such other substances as can or may be rendered, and all establishments or places where nauseous, offensive, or unwholesome business may be carried on": Clause 7, sec. 8, c. 4, city charter of 1863.

Under this authority, as it is claimed, the common council, on the eighteenth day of December, 1865, entered of record what is therein denominated an ordinance. Its material provisions are these: Section 1 declares "that in consideration of the acceptance by John Reid & Co. of said city, and their guaranty (provided by bond as hereinafter mentioned) within ten days from the date of the passage of this ordinance, that they will faithfully comply with the provisions of this ordinance, and all existing laws and ordinances, and all laws and ordinances that may hereafter be enacted or passed, relating to nuisances, authority and consent is hereby given and granted to said John Reid & Co., their heirs and assigns, from the first day of April, A. D. 1866, to have the exclusive right to have all the slaughtering (except that done at the regular packing-houses for packing purposes) carried on and done on their premises described as follows, to wit, the south half of block ten (10), in the south branch addition to the city of Chicago, in Cook County, in the state of Illinois."

The second section requires Reid & Co., before the first day of April, 1866, to erect good, ample, and complete buildings and yards, with the necessary conveniences, fixtures, and arrangements, including hot and cold water, gas-lights, etc., for

slaughtering and taking care of animals. It also confers the right on all butchers to take their animals to that place and slaughter them therein. It also provides for furnishing the several butchers with a division or portion of the building, etc. The third section requires Reid & Co. to keep the buildings, yards, and premises in good condition; and to remove the filth, etc., therefrom, as they may be required by ordinance.

The fourth section, under which these prosecutions were originated, is this: "After the first day of April, A. D. 1866, no other slaughtering establishment or establishments shall be suffered or permitted within the limits of the city of Chicago, nor shall any slaughtering by butchers or others be suffered or permitted, except as provided in section 1 of this ordinance, under a penalty of not less than twenty-five dollars nor exceeding one hundred dollars for each and every offense; provided that the city shall have the right to establish at any time hereafter two additional slaughter-houses, one to be located in the west division, and one in the north division." The fifth section declares that Reid & Co. may charge for the use of their establishment by the several butchers slaughtering animals therein the usual offal of the same, and no more.

The sixth section requires Reid & Co. to employ, at their own expense, at the establishment one or more special policemen, and to keep it at all times open to the inspection of the city health-officer, or any of his deputies. The seventh section declares that the city shall only be answerable to Reid & Co. for the exercise of reasonable diligence in enforcing that portion of section 1, and which confers the exclusive right upon them of having all the slaughtering done upon their premises. It also declares that in case the ordinance, or any part thereof, shall be declared inoperative or void by this court, the city shall not be held answerable to Reid & Co. for damages which they may sustain by reason of its non-enforcement. The eighth section requires Reid & Co. to execute a bond within ten days for the faithful performance of the conditions of that and other ordinances and laws concerning nuisances. The ninth section declares that if Reid & Co. shall permit the establishment to become a nuisance, then the common council shall have the right to repeal the ordinance. These are the substantial parts of the ordinance under consideration.

Afterwards, at the session of the general assembly in 1867,

the city charter was amended, and amongst others, this provision was adopted:—

“That the common council shall have power and authority to regulate and control the slaughtering of all animals in the city, or within four miles thereof, intended for consumption or exposed for sale in the city, and to enforce by additional ordinances any regulation, contract, or law heretofore made on the subject.”

Appellee contends that this was not an ordinance, and is incapable of being enforced as such. If it is a by-law, it is, to say the least, very informal. On its face it only purports to make a proposition to Reid & Co. for a contract, that they should have the exclusive right to have all animals intended for sale or consumption in the city slaughtered at their establishment. And the city proposed to use all reasonable efforts to compel all such animals to be slaughtered at that place for ten years from the first day of April, 1866, unless they should establish two others in the city at the places named. By the terms of this proposition, Reid & Co. were to have the option of accepting it, and it was not to take effect until they executed the bond as required. Until Reid & Co. complied, the proposition remained open and inchoate. All of its terms and conditions were entirely conditional. Such is not the language of a statute or of a by-law. They speak the language of command, and not that of mere conditional propositions.

It did not declare slaughter-houses, or the business of slaughtering animals in the city, a nuisance, or prohibit all persons from maintaining such establishments or pursuing such an occupation. On the contrary, it excepts from its operation slaughter-houses where animals are prepared for packing purposes. This latter branch, no doubt, exceeds, in the number of animals slaughtered, the other, as vast as is the consumption of so large a city as Chicago. In any point of view in which this resolution of the common council may be considered, we think it can only be held to be a contract after Reid & Co. assented to and accepted it.

Was this contract, then, binding upon the city or its inhabitants? Municipal corporations are only created for the better government and protection of local communities in the enjoyment of their rights than can be afforded by general laws. The powers which they are authorized to exercise are delegated to them to afford more ample protection to the com-

munity in their rights and privileges. Such bodies are never created to enable them to confer pecuniary benefits, or to grant monopolies to any portion of community, or to individual members thereof. The creation of such bodies is convenient, if not essential, for the regulation of the local police, to adopt and enforce all needful sanitary regulations, to establish and control markets, to repair highways, and perform the various other duties necessary to promote the comfort and well-being of such densely crowded communities as constitute large cities. But it is no part of the design in organizing such bodies that the corporate authorities shall enter into competition with its inhabitants in business or trade, or to sell, or even grant, special immunities to any portion of the inhabitants for their individual benefit or gain. The corporate authorities must exercise their franchises solely for the benefit of the community embraced within their limits. It is true that in exercising their powers for strictly legitimate purposes some persons may derive greater benefits than others, and a portion may even sustain inconvenience, if not injury. But having adopted reasonable measures to carry out the purposes of their creation, they will not be invalidated, although slight inequalities in its benefits may result.

Again, such bodies can only exercise such powers as are expressly conferred by the state, or such as are necessary to carry into effect those expressly delegated. The charter of the city authorized the location, management, and construction, and to regulate, license, restrain, abate, or prohibit within the prescribed limits, slaughtering establishments; and this was only authorized to be done by ordinance. And the very nature of an ordinance excludes all idea of a contract.

It is believed that the result of the authorities warrants the assertion that corporate franchises, whether municipal or private, are conferred in trust for the benefit of the entire body of corporators, and must, like all other trusts, be exercised with prudence and discretion. Hence their by-laws must be reasonable; and such as are vexatious, unequal, or oppressive, or are manifestly injurious to the interest of the corporation, are void, and of the same character are all by-laws in restraint of trade, or which necessarily tend to create a monopoly.

All by-laws should be general in their operation, and should bear equally upon all of the inhabitants of the municipality. Where privileges are granted by an ordinance, they should be open to the enjoyment of all, upon the same terms and condi-

tions. That the common council had the right, under the large powers conferred by the charter, to so regulate the business of slaughtering animals as to prohibit its exercise, except in a particular portion of the city, leaving all persons free to erect slaughtering-houses and to exercise the calling at the place designated, cannot be controverted. But an ordinance confining such a business to a small lot, or even a particular block of ground, is unreasonable, and tends to create a monopoly. It can hardly be said that only a tract of one acre can be selected in a large city like Chicago where it would not be unhealthy or offensive, and that it would be unhealthy or offensive on all of the lands adjoining, or in its vicinity, or in other portions of the city.

The charter authorizes the city authorities to license or regulate such establishments. Where that body have made the necessary regulations required for the health or comfort of the inhabitants, all persons inclined to pursue such an occupation should have the opportunity of conforming to such regulations, otherwise the ordinance would be unreasonable and tend to oppression. Or if they should regard it for the interest of the city that such establishments should be licensed, the ordinance should be so framed that all persons desiring it might obtain licenses by conforming to the prescribed terms and regulations for the government of such business. We regard it neither as a regulation nor a license of the business to confine it to one building, or to give it to one individual. Such action is oppressive, and creates a monopoly that never could have been contemplated by the general assembly. It impairs the rights of all other persons, and cuts them off from a share in not only a legal but a necessary business. Whether we consider this as an ordinance or a contract, it is equally unauthorized, as being opposed to the rules governing the adoption of municipal by-laws. The principle of equality of rights to the corporators is violated by this contract.

If the common council may require all of the animals for the consumption of the city to be slaughtered in a single building, or on a particular lot, and the owner to be paid a specific sum for the privilege, what would prevent the making a similar contract with some other person, that all of the vegetables or fruits, the flour, the groceries, the dry goods, or other commodities, should be sold on his lot, and he receive a compensation for the privilege? We can see no difference in principle. Nor is it a sufficient answer to say that butchering

animals is a nuisance, as the city have not proceeded, so far as we can see, on that assumption. They could not have regarded the slaughter-house of Reid & Co. a nuisance, or they would not have authorized its location and construction. And if it was not, how can it be said that others on adjoining lots, or even in its vicinity, similarly constructed and kept, would be nuisances? We are therefore of the opinion that this contract was not authorized and cannot be sustained.

It is however contended that the amendment of the city charter, already quoted, ratified and confirmed this contract. We have seen that the contract did not reasonably regulate, control, or license the slaughtering establishments of the city. And inasmuch as this contract is not specifically named, we cannot presume that the legislature intended to ratify an unreasonable and oppressive contract, but only such as was in accordance with the purposes for which the charter had been granted, and not those which were opposed to the design of creating such bodies. Again, it only authorizes the enforcement of any regulation, contract, or law, by additional ordinances. So far as we can see, no such additional ordinances have been adopted on that subject. Even if the legislature intended to confirm this contract, the city has not complied with the terms upon which it was authorized to be done.

It is again urged that, whether it be an ordinance or a contract, in either case it is void for uncertainty. This proceeding is based on the fourth section, which declares that no other slaughter-house shall be permitted in the city; and that no slaughtering by butchers or others shall be suffered or permitted, except as provided in the first section, under a penalty of not less than twenty-five dollars, nor exceeding one hundred dollars, for each and every offense. Is this only an agreement on the part of the city that they will not permit or suffer butchers or others to slaughter animals? or is it a command to butchers and others not to slaughter animals? Who can say? If it can be construed into a command directed to them, then what is the offense? Is it the slaughtering one, ten, or a drove of animals? Is the offense the killing of animals? or is it in maintaining the slaughter-house? or both? Again, who is to incur the forfeiture? Is it the person keeping the slaughter-house, or the butcher killing the animal? or is it the city which had contracted that all animals should be slaughtered on the premises of Reid & Co.? If intended to apply to a slaughter-house, does the offense

consist in its use for one day, or during the year, or other period?

The law never favors forfeitures by construction. All laws providing for the forfeiture of penalties must be strictly construed. To entitle the party to the recovery of a penalty, he must show that the defendant is clearly within the provisions of the law. We do not see that this provision, even if it was clearly an ordinance, would embrace these appellees. We cannot say that they by what they did violated this provision. We might no doubt conjecture that the common council intended to declare that any person who should slaughter any animal within the specified limits at a place other than Reid & Co.'s slaughter-house should incur the penalty. But they have failed to say so in terms, and we think by fair intendment. The forfeiture would as well apply to the city as to appellees.

That the city has the right, by reasonable and general provisions, by ordinance, to regulate and restrain all noxious and injurious callings within its limits, none can doubt. And that they may prevent slaughtering houses from being maintained, or animals from being slaughtered, in designated localities within the city, is equally true. And it may be that they can prohibit and wholly restrain it within the city limits. They no doubt have the power to designate the particular quarter of the city within which the business may be conducted, and prohibit it in others, and regulate and restrain them so as to prevent their becoming offensive or injurious; but in doing so, all persons should be free to engage in the business within those localities by conforming to the municipal regulations. That the common council can adopt an ordinance on this subject free from the objections to which this and like resolves are subject, is entirely obvious. And the city and its large population need suffer no inconvenience by holding this action of the common council inoperative.

The judgments of the court below are reversed and the causes remanded.

Judgment reversed.

POWER OF MUNICIPAL CORPORATIONS TO PASS ORDINANCES: See the extended note to *Robinson v. Franklin*, 34 Am. Dec. 627, where this topic is discussed at large, and the limits of the power are laid down. In the celebrated *Slaughter-house Cases*, 16 Wall. 48, the principal case is cited to the point that a municipal corporation cannot, under the authority granted to it to regulate any particular business or occupation, restrict that business in such a way as

to create a monopoly in some individual or corporation. This case practically settles the law upon this proposition, and follows the rule of the principal case. See the principal case cited to the same effect in *Chicago & N. W. R. R. Co. v. People*, 56 Ill. 382.

MERWIN v. CHICAGO.

[45 ILLINOIS, 122.]

MUNICIPAL CORPORATIONS ARE NEVER LIABLE TO PROCESS OF GARNISHMENT; and if summoned as garnishees, they may properly be discharged on motion, without first making answer.

GARNISHMENT against the city of Chicago. Upon motion, the city was discharged as garnishee without having been first required to answer.

Fuller and Shepard, for the appellant.

S. A. Irwin, for the appellee.

By Court, LAWRENCE, J. The only question presented by this record is, whether municipal corporations in this state are liable to the process of garnishment. This court held, in *City of Chicago v. Hasley*, 25 Ill. 596, 597, that the property of such a corporation could not be levied on and sold under execution. This decision was placed upon the grounds of public policy. However strong the obligation of a town or city to pay its debts, it was considered that to allow payment to be enforced by execution would so far impair the usefulness and power of the corporation, in the discharge of its government functions, that the public good required the denial of such a right. It was held that the twenty-ninth section of chapter 91 of the revised statutes, by which it is provided that the term "persons," when used in the statutes, shall include corporations, must be construed in the statute of judgments and executions as referring to private corporations.

Although this decision is not conclusive upon the question before us as *res adjudicata*, yet the entire spirit and reasoning upon which it is based must lead us to hold that a municipal corporation is not liable to process of garnishment. The question has been often before the American courts, and although the decisions are not uniform, in a large majority of the cases it has been held the writ would not lie. The reason given for these decisions is uniformly the same, and is substantially that given by this court in the case in 25 Illinois. It must be decided as a question of public policy. These municipal cor-

porations are in the exercise of governmental powers to a very large extent. They control pecuniary interests of great magnitude, and vast numbers of human beings, who are more dependent on the municipal for the security of life and property, than they are on either the state or the federal government. To permit the great public duties of this corporation to be imperfectly performed, in order that individuals may the better collect their private debts, would be to pervert the great objects of its creation. That its efficiency for purposes of government would be impaired by holding it liable to garnishment, cannot be doubted.

A large and growing city like Chicago must constantly have hundreds of persons in its employment; and if the city cannot at short intervals make a settlement of these multitudinous accounts, but is liable to be drawn into court at the suit of every creditor of its numerous employees, it will not only be engaged in much expensive and vexatious litigation in which it has no interest, but, if unable to safely pay its employees and contractors, it may lose the services of persons that may be of much value. We understand, however, the counsel for the appellant to concede that money due municipal officers, agents, or contractors is not liable to the garnishment; but it is insisted if the city had been required to answer, the alleged indebtedness in the present case would not have fallen in either of these classes. But, in our opinion, the city should not be subjected to this species of litigation, no matter what may be the character of its indebtedness. If we hold it must answer in all these cases, and the exemption from liability be allowed to depend in each case upon the character of the indebtedness, we still leave it liable to a vast amount of litigation in which it has no interest, and obliged to spend the money of the people and the time of its officials in the management of matters wholly foreign to the object of its creation. A municipal corporation cannot be properly turned into an instrument or agency for the collection of private debts. It exists simply for the public welfare, and cannot be required to consume the time of its officers or the money in its treasury in defending suits in order that one private individual may the better collect a demand due from another. A private corporation must assume the same duties and liabilities as private individuals, since it is created for private purposes. But a municipal corporation is a part of the government. Its powers are held as a trust for the common good. It should be per-

mitted to act only with reference to that object, and should not be subjected to duties, liabilities, or expenditures merely to promote private interest or private convenience.

A similar view of this question was taken in the following cases, cited by counsel for appellee: *Mayor of Baltimore v. Root*, 8 Md. 102 [63 Am. Dec. 692]; *Chealy v. Brewer*, 7 Mass. 260; *Bulkley v. Eckert*, 3 Pa. St. 368 [45 Am. Dec. 650]; *Burnham v. City of Fond du Lac*, 15 Wis. 194 [82 Am. Dec. 668]; *McDougall v. Board etc.*, 4 Minn. 184; *Mayor v. Rowland*, 26 Ala. 503; *Bank v. Dibrell*, 3 Sneed, 382; *Hawthorn v. St. Louis*, 11 Mo. 59 [47 Am. Dec. 141].

The circuit court did not err in discharging the city without answer.

Judgment affirmed.

MUNICIPAL CORPORATION IS NOT SUBJECT TO GARNISHMENT: See *Boynston v. Wicker*, 45 Ill. 137, a case decided on the authority of the principal case; and *Tribel v. Colburn*, 64 Id. 378, citing the principal case.

CHICAGO AND NORTHWESTERN RAILROAD COMPANY v. SWETT.

[45 ILLINOIS, 197.]

RAILROAD COMPANY MUST FURNISH ITS SERVANTS SAFE MATERIALS AND STRUCTURES, and keep its road and works and all portions of the track in such repair, and so watched and tended, as to secure the safety of all who may lawfully be upon them, whether passengers, servants, or others; and if the company fails in this respect, its employees not knowing of the defects, and not contracting with express reference to them, and being unable to ascertain them by the exercise of ordinary precaution or prudence, the company will be held liable for such injuries as their employees may suffer thereby.

DUTY OF RAILROAD COMPANY TO FURNISH ITS SERVANTS SAFE MATERIALS AND STRUCTURES cannot be avoided by the delegation of the power or authority to do so to any other or number of persons; for its undertaking with its servants in this regard is direct.

NEGLIGENCE OF FELLOW-SERVANT CANNOT BE SET UP AS DEFENSE in an action against a railroad company to recover damages for the death of a servant employed on the road, occasioned by accident arising from the defective construction of the road.

EMPLOYEE OF RAILROAD COMPANY UPON TRAIN OF CARS IS NOT BOUND TO KNOW whether the road and its culverts and bridges have been properly constructed, or not; he has a right to rely upon the implied undertaking of his employers that they have been properly constructed, and are safe for the passage of trains, and that his superiors will exercise all the necessary diligence to keep them in proper repair.

RULE THAT MASTER IS NOT LIABLE TO ONE SERVANT FOR INJURY CAUSED BY NEGLIGENCE OF FELLOW-SERVANT applies to those cases only where the injury complained of happens without the fault of the master, either in the act which caused the injury or in the employment of the person who caused it.

INSTRUCTION AS TO DAMAGES IN ACTION FOR NEGLIGENCE CAUSING DEATH is erroneous where it permits the jury to go beyond the evidence in fixing the amount thereof, and to allow themselves to be influenced by their own experience with mankind.

INSTRUCTION AS TO DAMAGES IN ACTION FOR NEGLIGENCE CAUSING DEATH is too general and indefinite where it places no limit to the extent to which the jury may go in allowing for prospective as well as present injuries.

NOMINAL DAMAGES ONLY CAN BE RECOVERED FOR NEGLIGENCE CAUSING DEATH, if the next of kin are collateral kindred of the deceased, and have not been receiving from him pecuniary assistance, and are not in a situation to require it; and this no matter how near such collateral relationship may be.

DAMAGES MAY BE RECOVERED FOR PECUNIARY LOSS IN ACTION FOR NEGLIGENCE CAUSING DEATH, where the next of kin have been dependent on the deceased, in whole or in part, for their support, no matter how remote the relationship. In such case, the amount is largely left to the jury; but the jury must nevertheless base its verdict upon the evidence, and allow nothing by way of *solatium*.

DEMURRER IS ADMISSION OF ALL FACTS IN DECLARATION which are well pleaded.

ACTION against railroad company for damages for personal injuries. The opinion states the facts.

H. W. Blodgett, and Glover, Cook, and Campbell, for the appellants.

Higgins, Swett, and Quigg, for the appellee.

By Court, BRESEE, C. J. This was an action on the case, brought in the circuit court of Whiteside County by Leonard Swett, administrator of John J. Fenlon, against the Chicago and Northwestern Railroad Company.

There was a demurrer to the declaration, which was overruled; and the defendants abiding thereby, a jury was called to assess the damages, and they were assessed at three thousand four hundred dollars.

To reverse this judgment, the defendants bring the case here by appeal, and make the points: 1. That the declaration is defective, and the demurrer should have been sustained; and 2. That the court gave improper instructions to the jury of inquest.

First, as to the declaration,—it contained two counts, the first alleging in substance that on the 22d of August, 1865,

the defendants were in control of a railroad passing through the county of Whiteside, with the locomotives, carriages, etc., running thereon; that Fenlon was employed by defendants as a fireman upon one of its locomotives running on the road; that it was their duty to keep the road and the culverts and bridges, which were part and parcel of the road, in proper repair, so as to prevent accidents to their servants engaged in running its engines and trains over the road, through any defects in the construction of the road, and its culverts and bridges, or want of properly repairing the same; that, not regarding their duty, they did not use proper care and skill in constructing their road, not in keeping it in repair, but, on the contrary, so carelessly, negligently, and unskillfully constructed and managed their road that by and through their negligence, unskillfulness, and improper conduct their road became and was left out of repair, the track and rails removed and out of place, etc. That the train of cars which deceased assisted in so operating was, without any negligence on his part or other servants of the defendants, precipitated into a gulf or opening across the track, and he, being then on the train in the discharge of his duties as fireman, was then and there immediately killed.

The second count alleges, as in the first, and that, as such fireman, he was under the direction and control of the defendants in performing his necessary part of the labor of running and operating the locomotive, and train of cars thereto attached; that the locomotive was furnished by defendants to Fenlon and others, their servants, to be by them run upon their railway and over the portion thereof running through Whiteside County, whereby it became the duty of the defendants to have and keep their railway, and the culverts, bridges, and embankments, part and portion of the same, in a skillful and proper manner, and to have repaired and reconstructed their road, and the culverts, bridges, and embankments, part and parcel thereof, as often as there was need, or as occasion required, so as to prevent accidents and loss of life happening to their servants through any defect in the construction or in the repairs of the road; that defendants, not regarding their duty in that behalf, did not use due and proper care and skill, neither in constructing nor in repairing their road and the culverts and bridges of the same, nor in keeping their road, its appurtenances and fixtures, in good order; but, on the contrary, they so carelessly and negligently constructed the culvert and

embankment on the road at a certain brook called Spring Brook, and so carelessly and negligently constructed the railway, its fixtures, appurtenances, and property there, that by and through the negligence, unskillfulness, and improper conduct of the defendants in that behalf, the railway became out of repair, the track and rails removed and out of place, and the locomotive and train of cars, without any fault or negligence of the deceased, or of his fellow-servants on the train, which he was employed in operating, was violently precipitated into a gulf or opening across the track, and was suddenly and violently stopped, crushed, and jammed together, and Fenlon was suddenly thrown from the train and instantly killed; that he had no knowledge of this defectiveness and insecurity of the road; averring that deceased left next of kin, and that they sustained damage, etc.

That the demurrer admits all the facts in the declaration which are well pleaded, is not controverted. What facts must be considered as well pleaded in these counts? or rather, what fact is not properly pleaded? We look in vain to see. The facts make out a case not of the nature supposed by appellants, to which the doctrine recognized by this and other courts has been often applied. Those cases hold that the principal is not liable to one servant for an injury sustained by him in consequence of the negligence of another servant of the same principal, while engaged in the same general business, provided due care was used by the principal in the selection of such servants: *Honner v. Illinois Cent. R. R. Co.*, 15 Ill. 550; *Illinois Cent. R. R. Co. v. Cox*, 21 Id. 20 [71 Am. Dec. 298], and cases there cited. In the case of *Illinois Cent. R. R. Co. v. Jewell*, 46 Id. 99, it was held a recovery by the administrator of the brakeman, who was killed by the carelessness and recklessness of the engine-driver, might be had on proof that the company had not exercised proper care in employing the driver; and there is a class of cases holding, where by the neglect of the superior to repair or keep the machinery of the road in order, by means of which an employee was injured, there should be an averment that the superior had notice of such defects, or that by the exercise of reasonable care he could have known them. This case proceeds on the ground of the original defective construction of the road and its appurtenances, which is admitted by the demurrer.

It is urged by appellants that a corporation can only act

through agents and employees, and whatever duty the corporation owes the public or its employees, must, from the very nature of things, be performed and exercised through the medium of employees.

This is so, in general, and it is well settled the employer corporation is bound to furnish to their servants safe materials and structures. Such an obligation is permanent, and cannot be avoided by the delegation of the power or authority to any other, or number of persons; for the undertaking with their servants is direct, that they will furnish suitable and safe materials and structures, and properly skilled and careful persons to assist in running the trains. A railway corporation, as we understand it, is responsible under the same circumstances, and for the same degree of care on the part of its agents, as any master is for a servant having direction of his wagon or carriage on the highway; and so for the wrongful acts and neglects of its servants, done within the scope of their employment, in the same manner and to the same extent and upon the same grounds that they are and should be held to the exercise of ordinary and reasonable care, not only in the selection of all their servants, in the selection of engines and cars, in watching over the arrangements of their trains and putting a competent force upon them, in order that in a business attended with so much danger no unnecessary hazard shall be incurred by any servant, by reason of unsafe arrangement or want of watchfulness over those in their employment, and most especially that they shall, in the first instance, properly construct their road with all its necessary appurtenances.

The principle that the master is not responsible for injuries occasioned by one servant to another is only applicable, as the authorities show, where the injury complained of happens without the fault of the master, either in the act which caused the injury, or in the employment of the person who caused it: *Keegan v. Western R. R. Corporation*, 8 N. Y. 175 [59 Am. Dec. 476].

It was held, in the case of *Perry v. Marsh*, 25 Ala. 659, that where a person was employed to work in a perilous service, if the danger belonged to the work which he undertook, or the service in which he engages, he will be held to all the risks which belong to either, but where there is no danger in the work or service by itself, and the peril grows out of extrinsic causes or circumstances, which cannot be discovered by the use of ordinary precaution and prudence, the employer would

be answerable precisely as a third person, if the injury was occasioned by his neglect or want of care. In such a case the injury would be outside of the employment, and the employer would, as to such injury, be in fact a third person, and fall within the same rule as to responsibility.

In the case before us, there was no special peril in acting as a fireman, only the general hazard all are subject to on a locomotive or on a train. The peril consisted in the defective construction of the road and its appurtenances, its culverts and bridges, which the fireman could know nothing about, and which he could not have discovered by the exercise of ordinary precaution and prudence; indeed, he was not required to know anything about that; the implied undertaking of his employers, that the road and culverts and bridges were properly constructed and safe for the passage of trains, was sufficient for him. He embarked in the service on the faith that it was a properly constructed road, and that his superiors were in the exercise of all the diligence necessary to keep it in good repair. The case shows the deceased was not killed by the fault of a fellow-servant, but by the carelessness and negligence of the defendants, acting through agents superior to and controlling the actions of the deceased. The declaration charges actual fault, in that the road was defective in its construction and not kept in proper repair, and the culverts and bridges also, at one of which, by reason of its defectiveness, Fenlon was killed.

There is no rule better settled than this, that it is the duty of railroad companies to keep their road and works, and all portions of the track, in such repair and so watched and tended as to insure the safety of all who may lawfully be upon them, whether passengers or servants, or others. They are bound to furnish a safe road, and sufficient and safe machinery and cars.

For their failure in this, and their employees not knowing the defects, and not contracting with express reference to them, the companies must be held liable for such injuries as their employees may suffer thereby. The demurrer to the declaration was properly overruled.

As to the instructions, we are satisfied they were improper, calculated to confuse and mislead the jury, and should not have been given.

The first instruction told the jury that it was "proper for them to exercise their own judgment as to the amount of

damages to which the plaintiff was entitled from the facts proved, and from their own experience with mankind."

This instruction seems to give a license to the jury to be influenced in their finding, not by the evidence in the cause, but from their own experience with mankind, which they might possess on the facts proved in the case. The instruction is not entirely intelligible, and should not have been given.

But the second instruction is more objectionable, as being too indefinite, and furnishing no certain rule for the guidance of the jury. They are instructed that they "are not limited to the assessment of damages for the actual present loss that may be proved; but they may go further, and compensate for the relative injury with reference to the future; they may compensate for pecuniary injuries, present and prospective." What is meant by compensation for the relative injury, with reference to the future, we do not clearly understand, and appellee has not enlightened us by any discussion of this instruction. Nor do we comprehend the extent of the last branch of the instruction. What is meant by pecuniary injuries, present and prospective? It is not explained, and we fail to perceive the meaning. Some limit certainly should have been prescribed within which the jury should be confined. As given, the instruction is too general and indefinite.

The rule laid down by this court in the case of *Chicago and Alton R. R. Co. v. Shannon*, 43 Ill. 338, is the proper rule in such cases as this.

We there said if the next of kin are collateral kindred of the deceased, and have not been receiving from him pecuniary assistance, and are not in a situation to require it, only nominal damages can be given, no matter how near such collateral relationship may be. If, on the other hand, the next of kin have been dependent on the deceased in whole or in part for their support, no matter how remote the relationship, there has been a pecuniary loss, for which damages must be given. So, also, if the deceased was a minor, and leaves parents entitled by law to his services.

We further held that while compensation for pecuniary loss was thus the basis of the action, the exact amount must necessarily be largely left to the jury, to be controlled by the sound discretion of the court, since it is impossible to determine with any certainty the pecuniary value of a life to those who have been dependent on the deceased when living. But, nevertheless, the pecuniary loss, taking into view all the cir-

cumstances, must be kept in view as the only proper basis of the verdict.

In the cases of *Chicago and Rock Island R. R. Co. v. Morris*, 26 Ill. 400, and *City of Chicago v. Major*, 18 Id. 360 [68 Am. Dec. 553], it was held that the measure of damages which the next of kin of the deceased has sustained by the death is to be determined from the pecuniary loss they have sustained,—that nothing is to be allowed by way of *solatium*.

The third instruction is also objectionable, as the disposition the deceased may have had to aid his mother has nothing to do with the case. The question was, Did he help her? was he bound to do so? and what does she lose in this regard by his death?

The instruction asked by the defendants, going to the fact of default on the part of his co-employees, was properly refused, as will be seen from what we have urged in this opinion.

The following instruction for the defendants should have been given, on the authority of the case above cited from 26 Ill. 400:—

“In this case, the jury can only find such damages in favor of the plaintiff as the evidence will warrant, by reason of the death of John J. Fenlon, and if they find from the evidence that the next of kin of said John J. Fenlon were not dependent upon him for their support, in whole or in part, then the jury can only find nominal damages against the defendants.”

For the reasons given, the judgment is reversed and the cause remanded, with leave to defendants to withdraw their demurrer and plead to issue.

Judgment reversed.

DUTY OF EMPLOYER TO FURNISH EMPLOYEES WITH SAFE MEANS AND APPLIANCES WITH WHICH TO WORK, AND GENERALLY TO PROVIDE FOR THEIR SAFETY.—The general principles and rules of law governing this topic are fully laid down in the note to *Bumell v. Laconia Mfg. Co.*, 77 Am. Dec. 212. The purpose here is to amplify that note by giving illustrations from the adjudged cases of the rules there laid down.

The general rule is, that it is the duty of the master to exercise ordinary and reasonable care not to expose his servant to unreasonable or extraordinary danger, by putting him to work in dangerous places, or with dangerous tools, machinery, or appliances. This is supported by the mass of authorities cited in the note to *Bumell v. Laconia Mfg. Co.*, *supra*. And in determining what amount of care constitutes reasonable care in a particular case, the nature and character of the business, the appliances used, and the risks therefrom to those employed are to be considered: *Noyes v. Smith*, 28 Vt. 59; *St. Louis & S. F. Ry Co. v. Weaver*, 35 Kan. 412; and the ques-

tion of negligence in such cases is therefore generally for the jury: *Ford v. Northbury R. R. Co.*, 110 Mass. 240; *Snow v. Housatonic R. R. Co.*, 8 Allen, 411.

Extent of Duty.—The duty extends to everything essential to insure the safe performance of the servant's duties, including not only safe machinery and tools, but safe premises and means of ingress and egress thereto, safe appliances generally, and also the keeping of all of the same in safe repair: *Buzzell v. Laconia Mfg. Co.*, 48 Me. 113; S. C., 77 Am. Dec. 212, and note.

Fault must be Imputable to Master. No recovery can be had in any case against a master for injuries to a servant from defective premises, machinery, or appliances, unless the negligence or fault causing the injury can be imputed to him: *Clark v. Holmes*, 7 Hurl. & N. 937; *Bartonskill Coal Co. v. Reid*, 2 McQueen, 266; *Flynn v. Beebe*, 98 Mass. 575; *Noyes v. Smith*, 28 Vt. 540. In *Flynn v. Beebe*, *supra*, where a woman-servant was washing clothes, and having put water from a kettle into the tub, rubbed the clothes, and in so doing severely cut her hands with a piece of glass which somehow came into the tub, the court held that as it could not be shown how the glass got there, the master was not liable.

The master is not bound to discharge his duty to his servants in person, but may give over the whole charge of his business to another, as is necessarily the case with corporations. In such cases the negligence of such middleman is chargeable to the master: *Clarke v. Holmes*, 7 Hurl. & N. 942; *Murphy v. Smith*, 19 C. B. N. S. 361; *Laning v. New York C. R. R. Co.*, 49 N. Y. 521; *Corcoran v. Holbrook*, 59 Id. 517. In this case the middleman is not a co-servant: *Clarke v. Holmes*, *supra*; but when the whole power of controlling the business is not given over to him, he becomes a co-servant; and for the negligence of co-servants the master is not liable. See as co-servants generally, the extended note to *Fox v. Sandford*, 67 Am. Dec. 588 et seq.

MASTER MUST EMPLOY ENOUGH COMPETENT SERVANTS to perform the service safely, and is liable for injuries resulting from a failure so to do, unless the servant can be considered to have consented to assume the risk: *Flike v. Boston & A. R. R. Co.*, 53 N. Y. 549. In this case a train, which required and was generally provided with three brakemen, was ordered to proceed with only two, one having overslept. The company was held liable for injuries resulting to its servants on the train, from an accident which was consequent upon the insufficiency of brakemen. So, in *Clarke v. Holmes*, 7 Hurl. & N. 948; *Booth v. Boston & A. R. R. Co.*, 73 N. Y. 38.

But where an engineer knew that his train was short-handed and could not be run safely without more hands, it was held that he should have declined to run the train, and that if he did run it under the circumstances he assumed the risk of resulting injury: *Mad River R. R. Co. v. Barber*, 5 Ohio St. 78; *Skippp v. Eastern Counties R. R. Co.*, 9 Ex. 223.

RISKS ASSUMED BY SERVANT.—While the master is bound to furnish reasonably safe appliances and instrumentalities with which to work, he does not insure the safety of the employee in the employment. There are certain risks which servants are bound to assume, and certain defects which they are bound to notice or presumed to know. The general rules are stated in the note to *Buzzell v. Laconia Mfg. Co.*, 77 Am. Dec. 222.

In *Nashville R. R. Co. v. Elliott*, 1 Cold. 612, S. C., 78 Am. Dec. 506, it was held that a servant entering the employ of another assumes all the ordinary risks incident to the employment, and that if he enters an extra hazardous employment he knows or ought to know of the extraordinary risks attaching to such employment, and guard against them or their consequences.

by stipulation, or provision in the rate of compensation, or otherwise. What are such ordinary risks depends on the circumstances of the particular case or employment, and the question whether the servant assumed a particular risk is for the jury: *Clarke v. Holmes*, 7 Hurl. & N. 944.

Generally speaking, a servant takes the risk only of what may be called "seen dangers," that is, those which are patent and obvious. But the servant may have knowledge of other dangers and defects, and it is held, as to these, that if he continues in the employment of his master without complaint to him, and promise by him to remedy or prevent the defect or danger, he, the servant, assumes the risk from such defects, and cannot recover for injury therefrom. A servant is bound to notice patent defects in appliances and instrumentalities of the business in which he is engaged; and for injuries resulting from a failure so to do, the master is not liable: *Toledo R. R. Co. v. Asbury*, 84 Ill. 429; *Chicago etc. R. R. Co. v. Munroe*, 85 Id. 25; *Heath v. Whitebreast C. M. Co.*, 65 Iowa, 737; *Haurally v. Northern C. R. R. Co.*, 46 Md. 280; *Crutchfield v. Richmond etc. R. R. Co.*, 78 N. C. 300. Thus a servant using a plow so obviously defective that a prudent person would not have used it cannot recover for injuries resulting from its use: *Moline P. Co. v. Anderson*, 19 Ill. App. 417.

Where a man driving a van, knowing that it was overloaded, sustained an injury in an accident resulting from the fact that the van was overloaded, it was held that the master was not liable: *Priestley v. Fowler*, 3 Mees. & W. 1. A night-watchman was told, as part of his duty, to look into a yard each morning. In the yard was a ferocious dog, which would bite any one; but the watchman had been told that the dog was tied up every morning, and was allowed to run loose only at night. He was bitten one morning because the owner had forgotten to have the dog tied. It was held that the owner was liable, and that the risk was not one which the watchman assumed: *Muller v. McKesson*, 73 N. Y. 195; S. C., 23 Am. Rep. 123. One who voluntarily works on a raised platform, without a railing, or which is unsafe because sloping and alippery, takes the risk of being injured: *Moulton v. Gage*, 138 Mass. 370; *English v. Chicago & M. R'y Co.*, 24 Fed. Rep. 906. A railroad employee, who knew of an uncovered culvert near the road, and knew that he must couple cars near it, cannot recover for injury from the fact of its not being covered: *Thayer v. St. Louis R'y Co.*, 22 Ind. 26; S. C., 85 Am. Dec. 409.

It has been held that a servant does not assume the risk resulting from insufficient means of fire-escape: *Schwandner v. Bridge*, 33 Hun, 186. One whose business is to stand in a dangerous position to signal trains is held to assume the risk incident to his duties: *Kennedy v. Manhattan R'y Co.*, 33 Id. 457. A brakeman knowing that cars have different couplings takes the risk of injury in trying to couple them: *Hathway v. Michigan Cent. R. R. Co.*, 51 Mich. 253; S. C., 47 Am. Rep. 569. One whose foot is caught in a T-rail cannot recover of his master for injuries resulting, though a U-rail would have been safer, if he knew the danger, and continued in the service without objection: *Smith v. St. Louis etc. R'y Co.*, 69 Mo. 32; S. C., 33 Am. Rep. 484. An engineer is not bound at his peril to see if a track is safe, though he knows the rails are light and well worn, if the whole is apparently reasonably safe and substantial: *Devlin v. Wabash etc. R. R. Co.*, 87 Mo. 545. One repairing a dilapidated railroad, and riding thereon to the point of his labor, assumes risks which another would not, and he cannot contend that it was the duty of the company to provide a safe road: *Brick v. Rochester etc. R. R. Co.*, 98 N. Y. 211. One serving as a brakeman cannot recover for in-

jury caused by the projecting ends of boards upon cars which he was coupling, if a competent brakeman could have safely coupled such cars: *Atchison etc. R. R. Co. v. Plumbett*, 25 Kan. 188. One using brakes which are obviously defective cannot recover for injury from such defects: *De Graff v. N. Y. Cent. R. R. Co.*, 3 Thomp. & C. 255. In *Railroad Company v. Jackson*, 55 Ill. 492, it was held that a brakeman who was injured as a result of the fact that the ladder on the car lacked two rungs could not recover if he had been serving on said car for some time; that it would be presumed that he knew of the defect, and assumed the risk.

The servant's knowledge of the risk, to excuse the master, must be such as will amount to a waiver of performance of the master's duty toward him: *Roberts v. Smith*, 2 Hurl. & N. 231; *Ashworth v. Stamolz*, 30 L. J. Q. B. 333.

Where appliances are obviously defective, but the danger is not apparent, the master may still be held liable if he fails to take steps to prevent injury or to ascertain if there is danger. In *Caledonia R'y Co. v. Greenock S. Co.*, 2 Sea. Cas., 4th ser., 671, the master's building, which had been properly and securely built, had, by the weight of snow on it, been injured so that the roof had fallen in. Servants were sent to clear away the debris, and while so doing were injured by the fall of a wall which had been weakened by the weight of snow and the fact that the roof was gone. It was held that the master should have taken necessary steps to secure the wall or ascertain if it was dangerous, and was liable for the injuries from a failure so to do.

Latent Defects or Hazard. — The servant does not assume risks from, nor is he bound to look for, latent defects or hazard: *Kroy v. Chicago etc. R. R. Co.*, 32 Iowa, 357. If the defects or hazard are such that an exercise of a reasonable amount of attention would have discovered them to the servant, he cannot recover; but he is not bound to examine machinery, or the walls of a building or its timbers, to find whether it is safe or not, if no obvious or apparent defects or hazard appear: *Mullowney v. Railroad Co.*, 36 Id. 462; *Way v. Railroad Co.*, 40 Id. 341. And if the latent defect is such a one as the master knew of, or could with reasonable care and by an inspection have discovered, he is liable: *Clowers v. Wabash etc. R'y Co.*, 21 Mo. App. 213. And it is held that if there is any extrinsic danger or extra hazard in a particular business which a servant, from the nature of the business or appliance used, would not discover, the master should disclose it to the servant, and if he fail to do so, he is liable: *Perry v. Marsh*, 25 Ala. 659; *Baxter v. Roberts*, 44 Cal. 187; S. C., 13 Am. Rep. 160; *Pittsburgh etc. R'y Co. v. Adams*, 105 Ind. 151. And it is no excuse that the servant did not ask as to the danger: *Missouri Pac. R. R. Co. v. Watts*, 64 Tex. 568.

When the handle of a hand-car furnished to a servant was painted so that it looked to be in good condition, but proved to be really defective, and the servant was not warned of the defect, the master was held liable: *Siele v. Hannibal & St. J. R. R. Co.*, 82 Mo. 430. A person was employed to tear down a fence, but was not told that certain persons claiming the land on which the fence was situated were upon the land, armed and ready to make resistance to the tearing down of the fence. The servant was shot while doing the work, and the master was held liable for not disclosing the knowledge of the extraneous danger: *Baxter v. Roberts*, 44 Cal. 187; S. C., 13 Am. Rep. 160. Of course, if, having been informed of the hazard, the servant chooses to undertake the employment, he takes the extra risk, and the master is not liable: *Coombs v. New Bedford Co.*, 102 Mass. 572. Where a servant was given powder with which to blast, the compound being a newly invented one, which was more dangerous than ordinary blasting-powder, and the servant was

not informed of its character, the master was held liable for an injury from its premature discharge: *Smith v. Oxford Iron Co.*, 42 N. J. L. 467; S. C., 36 Am. Rep. 535; *Spelman v. Fisher Iron Co.*, 56 Barb. 151. Where the proprietor of a lime-kiln did not inform an inexperienced laborer of the danger of falling into the fire by a subsidence of the mass upon which he was required to work, he was held liable: *Parkhurst v. Johnson*, 50 Mich. 70; S. C., 45 Am. Rep. 78. It is generally held that a master should warn inexperienced servants: Note to *Buzzell v. Laconia Mfg. Co.*, 77 Am. Dec. 224, and this applies to minors and those of insufficient understanding to appreciate the danger. It was held that an inexperienced boy working on machinery was entitled to notice of the danger: *Dowling v. Allen*, 74 Mo. 13; S. C., 41 Am. Rep. 298; *Fones v. Phillips*, 39 Ark. 17; S. C., 43 Am. Rep. 264. In the latter case, however, it was held that patent defects and hazard need not be pointed out. In *Leary v. Boston & A. R. R. Co.*, 139 Mass. 580, S. C., 52 Am. Rep. 733, it was held that if an extra hazardous employment was undertaken, even by an inexperienced servant, through fear of being discharged, but with knowledge of the danger, the servant could not recover.

There is no implied contract on the master's part that a piece of apparatus (here a locomotive) is perfect, and if the defect was a latent one, which could not be discovered by the ordinary tests nor by the exercise by the master of a reasonable amount of care, he is not liable for injuries therefrom: *Noyes v. Smith*, 28 Vt. 59; S. C., 65 Am. Dec. 222; *Louisville etc. R. R. Co. v. Allen*, 78 Ala. 494. Where a spring in a draw-bar was defective, so that on coupling cars an injury resulted, and care would not have discovered the defect, the master was held not liable: *Atchison etc. R. R. Co. v. Wagner*, 33 Kan. 660. Again, where a rope apparently safe was really defective, so that it broke and caused an injury, the master was held not liable, as he had no more means than the servant of discovering the defect: *Nelson v. Dubois*, 11 Daly, 127.

PROMISE TO REPAIR. — As stated in the note to *Buzzell v. Laconia Mfg. Co.*, 77 Am. Dec. 224, when the master has promised to repair, the servant is not to be treated as though he had assumed the risk from the defect: See the cases there cited, and *Green v. Minneapolis etc. R. R. Co.*, 31 Minn. 248; S. C., 47 Am. Rep. 785; *Missouri F. Co. v. Abend*, 107 Ill. 44; S. C., 47 Am. Rep. 425; *Manufacturing Co. v. Morrissey*, 40 Ohio St. 148; S. C., 48 Am. Rep. 669.

DUTY TO FURNISH SAFE PREMISES AND CONDITIONS IN AND UNDER WHICH TO WORK. — It is not deemed necessary in this note to state more than generally the principles and rules arising out of this topic. A number of instances illustrating the particular rules have been given above. In this and the following subdivision will be found a large number of cases in which the rules stated and those laid down in the note to *Buzzell v. Laconia Mfg. Co.*, 77 Am. Dec. 224, have been applied.

All the means of conducting the business in which a servant is engaged must be reasonably safe. And this includes the premises upon which he is required to work. A servant working in a defective building might recover for an injury from the defects, but if knowing the facts he continues to work there, he cannot recover: *McGlynn v. Brodie*, 31 Cal. 376. The master cannot generally be held liable for injuries to a servant from unfenced or unguarded machinery if the servant could have known thereof, and he was able to appreciate the danger, for in such case the matter is patent, and one which the servant would be bound to know. In *Stone v. Oregon Mfg. Co.*, 4 Or. 52, a laborer who was passing a rapidly revolving fan, carrying a rope, stepped

so near that the fan caught the rope, and the servant was injured. The master was held not liable. In *Kelly v. Silver Springs Co.*, 12 R. I. 112, S. C., 34 Am. Rep. 615, it was held that a servant could not recover for injuries from unfenced machinery if he had long worked at or near it without complaint. One serving a machine with unboxed cogs, and who would not have been injured had the cogs been boxed, was not allowed to recover, as it was held the danger was obvious and an assumed risk: *Sanborn v. Atchison & T. R. R. Co.*, 35 Kan. 292; *Schroeder v. Michigan Car Co.*, 56 Mich. 132. In *Sullivan v. India Mfg. Co.*, 113 Mass. 396, it was said that while a master is not bound to fence machinery, he may be liable to inexperienced or young servants for injuries from machinery which is not fenced. In this case, a boy was employed to tend a drawing-machine, and his duty required him to pass between the machinery in a certain way. It was held that if he was properly cautioned, and could appreciate the warning, that the master would not be liable. See, to the same effect, *Coombs v. New Bedford C. Co.*, 102 Id. 572; S. C., 3 Am. Rep. 506. A team driver's business was to pass along a certain road to a mill, the road running under a revolving shaft. Between two trips the shaft was repaired and readjusted so as to be lower than before, and too low to drive under. The driver was not warned of the change, and in attempting to so drive was injured. It was held that the master was liable: *Hawkins v. Johnson*, 105 Ind. 29; S. C., 55 Am. Rep. 169.

A railroad company has been held liable for injuries to servants on a train from a track which was improperly laid: *Snow v. Housatonic R. R. Co.*, 8 Allen, 441; S. C., 85 Am. Dec. 720. Likewise where the engine and tender of a train were not fastened by safety-chains: *Morse v. N. Y. Cent. R. R. Co.*, 39 Hun, 414. So where dangerous holes in the road-bed caused injury: *Lewis v. St. Louis R. R. Co.*, 59 Mo. 495; S. C., 21 Am. Rep. 385. A railroad company was held liable for injuries from an obviously defective bridge, which the company had purchased, but proceeded to use without making proper repairs: *Vosbury v. Lake etc. R. R. Co.*, 94 N. Y. 374; S. C., 46 Am. Rep. 148. In *De Forest v. Jewett*, 23 Hun, 490, it was held that one who, while coupling cars, caught his foot in a trench or ditch, could not recover, as the risk was one of the business, and which he must have assumed. So, in *Hass v. Buffalo etc. R. R. Co.*, 40 Id. 145. One sent under a car should be provided with a flag. Yet if he was an experienced man, and experienced men do go without, he may be held to have waived the right to this precaution: *O'Rourke v. Union P. R. R. Co.*, 22 Fed. Rep. 189. One pushing a hand-car fell in a water-way, of which he had no special notice: held, that he could not recover, the risk being one incident to his employment: *Couch v. Charlotte etc. R. R. Co.*, 22 S. C. 557.

In the well-known case of *Ryan v. Fowler*, 24 N. Y. 410, S. C., 82 Am. Dec. 315, the master was held liable for injuries received by a servant from the fall of a privy, attached to his premises, the accident being the result of defective supports.

For injuries from unnecessary obstructions near track, or obstructions unnecessarily near track, a railroad company has been held to be liable: *Kearns v. Chicago etc. R'y Co.*, 66 Iowa, 599. A servant is not presumed to know of an awning projecting over a track, so that he would assume risk of injury therefrom. The decisions on this point seem to depend on whether the servant knew or ought to have known of the obstructions: *Baylor v. Delaware etc. R. R. Co.*, 40 N. J. L. 23; S. C., 29 Am. Rep. 208; *Lovejoy v. Boston etc. R. R. Co.*, 125 Mass. 175. Sheds unnecessarily so near the track as to be dangerous have been held to entitle the servant to recover: *Illinois etc. R. R. Co. v. Whalen*,

19 Ill. App. 116. So of a telegraph pole, signal post, or stump, which need not have been near the track: *Chicago etc. R. R. Co. v. Russell*, 91 Ill. 298; S. C., 33 Am. Rep. 54; *Riley v. West Va. etc. R. R. Co.*, 27 W. Va. 145; but see *Lovejoy v. Boston & L. R. R. Co.*, 125 Mass. 79; S. C., 28 Am. Rep. 206. So of a water-tank: *Davis v. Columbia etc. R. R. Co.*, 21 S. C. 93. But in the case of an awning over the track, it is held that the company need not build it so high that a brakeman can stand erect upon a train while passing under it: *Baylor v. Delaware etc. R. R. Co.*, 40 N. J. L. 23; S. C., 29 Am. Rep. 208; *Rains v. St. Louis etc. R. R. Co.*, 71 Mo. 164; S. C., 36 Am. Rep. 459. And a company has been held not liable for injuries from a low bridge under which the train passed, the servant having knowledge of the bridge: *Baltimore etc. R. R. Co. v. Rowan*, 104 Ind. 88.

A servant was injured by the fall of bridge which he knew to be insecure, while driving over it with a very heavy load. He was held guilty of contributory negligence barring recovery: *Mansfield v. McEnery*, 91 Pa. St. 185; S. C., 36 Am. Rep. 662.

A case has been given above in which a master was held liable for failure to furnish safe fire-escape, whereby the servant was injured. In *Keith v. Granite M. Co.*, 126 Mass. 90, S. C., 30 Am. Rep. 666, it was held that a master was not liable if he does furnish safe means of escape, but has not furnished any means of giving an alarm.

A servant properly in a particular part of premises may recover for defects therein, but if improperly there he cannot recover. In *Atlanta C. F. Co. v. Speer*, 69 Ga. 137, S. C., 47 Id. 750, a child who worked during the night in a basement was, after work, told to remain in the second story until daylight, when it would be safe to go home. The child, while playing with other children there for like reason, fell down an unguarded elevator-shaft in the passage-way. The master was held liable. A carpenter on a vessel hid his tools in the evening, and on going to get them in the morning fell down an unprotected bunker-hole. The master was held liable: *Belford v. Canada Shipping Co.*, 35 Hun. 347. But a servant groping in a passage-way where he has no business to be cannot recover for injuries from falling down an unprotected elevator-shaft in such passage: *Pfeiffer v. Ringler*, 12 Daly. 437. One in a theater, whose business was on the stage, fell through a hole by reason of the fact that there was a want of light. No duty to light the stage was alleged. Held, that one of the incidents of the business was the danger of falling through trap-doors, etc., and that the servant should have looked for such traps and exercised care to avoid the injury: *Seymour v. Maddox*, 16 Q. B. 326. A servant working in one room in a mine left it and went to visit one of his fellows in another room. He had no business there, and while there was injured. Held, that he could not recover for an injury from the falling of the roof: *Wright v. Rawson*, 52 Iowa, 329; S. C., 35 Am. Rep. 275. In *Wannemaker v. Burke*, 111 Pa. St. 423, the master was held not liable for an injury from a small hole in the floor out of the line of travel, and left for a few days pending repairs.

A master is not liable to an employee who sustains an injury by falling on a slippery floor, against an uncovered cog of a printing-press: *Clark v. Barnes*, 37 Hun. 389. A servant who was called on to mount a platform, and was told that it was safe, but not given a chance to examine it, may recover for injuries from its defective condition: *Benning v. Steinway*, 101 N. Y. 547.

It is not contributory negligence in an engineer to stay at his post in the face of an impending collision: *Pennsylvania etc. R. R. Co. v. Roney*, 89 Ind.

453; S. C., 46 Am. Rep. 173; *Coltrill v. Chicago & St. P. Ry Co.*, 47 Wis. 634; S. C., 32 Am. Rep. 796.

A gravel train backed without warning to a shoveler. The railroad company was held liable for resulting injuries: *Campbell v. N. Y. C. R. R. Co.*, 35 Hun, 506. A promise was made to one who went out to shovel snow from a track that a train would be kept near him so that he might go in the car and warm himself. This was not done, and his foot was frozen. The company was held liable: *Hyatt v. Hannibal & St. J. R. R. Co.*, 19 Mo. App. 287.

Defective shafting in a mine, of which the master knew, will render him liable for injuries therefrom to his servants working in the mine: *Kelly v. Howell*, 41 Ohio St. 438; *Mellors v. Shaw*, 1 Best & S. 437. So, where an injury occurred by a fall of rock caused by a seam widening, of which the master knew: *Pantzar v. Tilly F. M. Co.*, 98 N. Y. 562. In *Hoffnagle v. New York Cent. R. R. Co.*, 1 Thomp. & C. 346, where brick arches had been built, and before the proper time the supports were withdrawn, resulting in injury to a servant working in the building, the master was held liable.

DUTY TO PROVIDE SAFE MACHINERY AND APPLIANCES. — A master is not necessarily bound to adopt the best and latest improvements in machinery and appliances: See the note to *Buzzell v. Laconia Mfg. Co.*, 77 Am. Dec. 222. Thus a mine-owner is not bound to use the most expensive precautions against fire-damp; but if he uses reasonable and safe methods to ventilate, he is not guilty of negligence: *Berna v. Gaston G. C. Co.*, 27 W. Va. 285; S. C., 55 Am. Rep. 304. Where a printing-press had no safety-clutch, it was held that the master was not liable, if with exercise of reasonable care the press was safe without it: *Sweeny v. Berlin etc. Co.*, 101 N. Y. 520; S. C., 54 Am. Rep. 722. An engine, though not of the latest model, if reasonably safe, and as well adapted to the business as a more perfect and recent invention, may be properly used, and for an injury therefrom the master is not liable: *Nashville etc. R. R. Co. v. Elliott*, 1 Cold. 611; S. C., 78 Am. Dec. 506. So, with railroad brakes which are in general use, and practically as safe as more modern ones: *Wright v. Delaware etc. R. R. Co.*, 40 Hun, 343.

The use, however, of old inventions and apparatus which are not as reasonably safe as the modern is negligence. So held where old couplings, abandoned as unsafe, were used on a railroad train: *Crane v. Missouri P. Ry Co.*, 87 Mo. 588. Failure to use a patent or ordinary coupling, but using instead a rope and pin, has been held negligence: *Muirhead v. Hannibal & St. J. R. R. Co.*, 19 Mo. App. 634. For the use of defective bumpers, a railroad company was held liable: *Gottlieb v. N. Y. etc. R. R. Co.*, 100 N. Y. 462.

A brakeman can maintain an action for injuries resulting from the negligence of a railroad company to have its cars inspected to discover defects: *Braun v. Chicago etc. R. R. Co.*, 53 Iowa, 595; S. C., 36 Am. Rep. 243. But it has been held that where a loaded car is received by a railroad company, from another company for transportation, it may presume that the car is safe, and does not owe to its servants the duty of inspecting such car: *Ballou v. Chicago etc. R. R. Co.*, 54 Wis. 259; S. C., 41 Am. Rep. 31.

It has already been stated that a brakeman riding on a car from time to time must be presumed to have known of a defective ladder thereon; but it is held that otherwise the company will be held liable for such defect: *Chicago & N. W. Ry Co. v. Jackson*, 55 Ill. 492; S. C., 8 Am. Rep. 661. So held where a car was put in a train at night and the injury resulted before opportunity to know of the condition of the ladder: *Richmond etc. R. R. Co. v. Moore*, 78 Va. 93.

Where a boiler apparently perfect proved to be defective, and the defect

could not have been discovered by the ordinary tests, the master was held liable: *Indiana etc. R'y Co. v. Toy*, 91 Ill. 474; S. C., 33 Am. Rep. 57. A master is liable for explosion of a steam-boiler for failure to use a fusible plug, as required by statute: *Cayzer v. Taylor*, 10 Gray, 274; S. C., 69 Am. Dec. 317.

For using machinery improperly, or for an improper purpose, the master is of course not liable. This is contributory negligence on the servant's part, which will bar recovery: *Felch v. Allen*, 98 Mass. 573; *Murtensen v. Chicago etc. R. R. Co.*, 60 Iowa, 705; as where one knowing better cuts bar-iron with a maul and cold-chisel so that it splinters and hurts his eyes: *Houston & T. O. R'y Co. v. Conrad*, 62 Tex. 627.

WOODMAN v. HOWELL.

[45 ILLINOIS, 367.]

PERSON HAS NO RIGHT TO GO INTO OR UPON PREMISES OF ANOTHER after the owner has forbidden him to do so; nor has he a right after having entered by leave to stay upon being requested by the owner to depart; and this though such premises be a business office or mercantile house, workshop, factory, or other place of business. No doubt the very fact that a professional man or a merchant or other person opens an office to transact business with and for the public is a tacit invitation to all persons having business with him, and a permission to others, to enter unless forbidden; but this does not divest the owner of his control over it, or the right to prevent whom he pleases from entering, and to require any and all persons to depart after they have once entered.

PERSON WHO IS IN OFFICE OF ANOTHER BY LATTER'S COURTESY cannot authorize others to use, occupy, or even enter the office; and if he does so, the proprietor has the right, either in person or through a servant, to require them to leave.

PROPRIETOR OF PLACE OF BUSINESS MAY USE SUFFICIENT FORCE TO REMOVE FROM PREMISES a person who, having no right to remain, refuses to depart after being requested to do so; and he does not incur liability for trespass in so doing; but if in asserting his rights the proprietor uses more force than is necessary to eject the intruder, or inflicts unnecessary injury, he then becomes a trespasser and liable as such.

TRESPASS. The opinion states the facts.

Fuller and Shepard, for the appellant.

E. W. Evans, for the appellee.

By Court, WALKER, J. This was an action of trespass *vi et armis*, for an assault and battery. A trial was had at the October term, 1866, by the court and a jury, resulting in a verdict of guilty, and the damages were assessed at three hundred dollars. A motion for a new trial was entered, and was overruled by the court, and judgment was rendered on the verdict. The case is brought to this court by appeal to reverse the judgment.

It appears from the evidence that appellee was employed by several commission merchants to be at the elevator on the arrival of grain consigned to them, to ascertain the inspection fixed on each car-load; to take samples, and furnish his employers therewith earlier than such information could be had in the regular course of business. It also appears that appellee got his information in reference to inspection by being present when the inspection was made, or from the inspector's books, who, by permission of the owners, left his books in which inspection was made in the office in question. And it further appears that appellee had gone into the office at the time the difficulty occurred for the purpose of examining the inspector's books as to the character of grain which had arrived consigned to his employers.

Appellant asked him if he had any business to transact with those having charge of the office. He replied that he did not know that he had. Appellant then told him that if he had not he had better leave, as he did not want him there; he ordered him out, and said if he did not go he would put him out. Appellee replied that he did not think he would; that he would go when he was ready. Appellant opened the door, and caught appellee by the collar, and pushed him out. It seems that appellee resisted. Austin swears that appellee caught hold of appellant and would not let him close the door; that appellant tried to push appellee down the steps, but he held to the railing; that no person connected with that office has anything to do with the grain, or knows anything about who owns it; that the inspectors inspect the grain in the yard in the cars, and enter the inspection in their memorandum books; that they were permitted to go into that office as a matter of courtesy, and not as a right, and had no connection with the business of the office. It appears that appellee, since that time, gets the information as usual, without going into the office.

Odell, a member of the firm of Flint, Thompson, & Co., testified that appellant was at the time their foreman. That the office where this trouble occurred was theirs; that they had an office at the elevator for the use of the foreman and his clerk, to receive orders drawn on the elevator; that all of their employees had access to it and the right of access; that tally books and shipping receipts are kept there, but nothing relating to the inspection of grain that they had anything to do with; that they had permitted the board of trade inspectors

to use that room, as they might require, to figure up their books, but no other persons were permitted there; that appellee was not an inspector when put out; that Flint, Thompson, & Co. had given directions to the foreman to exclude all persons who had no business with the firm, except the inspectors; that these instructions were given before the difficulty occurred.

We are aware of no rule of law that gives any person not having a special irrevocable license the right to enter and continue upon the premises of another when requested to depart. To permit all persons at their mere will to enter and to remain in another's house, or even his close, so long as they may choose, and this, too, after being requested to depart, would wellnigh destroy the dominion of the owner over his property, and would render it almost useless as well as worthless. It would be monstrous to hold that a man's privacy may be so far infringed that any and all persons may at will enter his dwelling and remain, after being requested to leave, until it suited their convenience to depart. Although it might not be so offensive to permit it on the close of the owner as his dwelling, it would be an outrage upon his rights. Such has never been the law, and so long as there is such a thing as individual ownership of property, it is not probable that such will ever be.

We are aware of no rule which authorizes one man to go into or upon the premises of another, even if it be his business office or mercantile house, work-shop, factory, or other place of business, when the owner shall have forbidden him. The fact that he has devoted it to such purposes does not transfer the title to the public, or give others the right to use and occupy it, or deprive him of his control over it. The very fact that a professional man or a merchant or other person opens an office to transact business with and for the public, no doubt, is a tacit invitation to all persons having business with him, and a permission to others, to enter unless forbidden. But he does not lose his control over it, or the right to prevent whom he pleases to enter, and to require any or all persons to depart after they have once entered. It is hardly reasonable to suppose that persons having business with the public will prohibit persons having business with them from going into their business houses; but if they chose to do so, they only exercise a legal right of which they cannot be deprived.

Nor does it make the slightest difference that appellee en-

tered for the purpose of getting information from the inspector's books, as that officer was there by the courtesy of the proprietors, and not as his place of business, but simply to figure up his books, as one of the proprietors testified. Only having such permission, he could not authorize others to use, occupy, or even enter the office; and if he had done so, the proprietors would still have had the right to require them to leave, either in person or through a servant. The inspectors had no right, so far as this evidence shows, to take persons into the office to transact business with them, and having none, appellee cannot justify his remaining therein because he had business to transact with the inspector. And this seems to have been the principal ground upon which the right of recovery is based. Nor do we see that, because it was convenient or even profitable to his employers to have him enter the office to obtain the desired information, he could therefore defy the proprietors and appropriate their office, either in whole or in part, to that purpose, against the will of those having the possession.

The plea that appellant was the servant of the owners, and as such, under their direction, requested appellee to leave the office, and upon his refusal ejected him, using no more force than was necessary, presented a complete defense. It in fact was conceded by appellee, when he filed his replication to the plea. The evidence also shows that the plea was sustained by the proof. Appellant was authorized and required by his employers to exclude all persons having no business with the firm from the office. Appellee said he had none with them, and was then requested to leave; and when he refused, appellant, as he had a right to do, ejected him, and so far as we can see, employed no unnecessary force; nor do we see that appellant sustained any material injury by the operation. Appellant, when appellee refused to go, had the legal right to use sufficient force to remove him from the premises. Appellee knew that he had obtained no authority from any person capable of granting it to go into or remain in the office, nor does he seem to have questioned appellant's authority from his employers to exclude him from the office; but he seems to have willfully persisted in his wrongful occupancy of the room, as it unquestionably was after being requested to depart.

Nor can it make the slightest difference that it was to the interest of the proprietors that the inspectors should make the entries in their books in the office. Whether it was to their

advantage or disadvantage could not in any degree alter the relations of appellee and the owners of the office.

In any point of view in which we can consider this case, we are unable to see that the evidence warrants a recovery. Had the evidence shown that appellant used more force than was reasonably necessary to eject appellee, then it would be otherwise. In such cases, if the person asserting his rights goes beyond the bounds of reason, and uses more force than is necessary, or inflicts unnecessary injury, he then becomes a trespasser, and liable as such. But we fail to discover evidence of such action on the part of appellant in this case.

The judgment of the court below must be reversed, and the cause remanded.

Reversed and remanded.

THE PRINCIPAL CASE IS DISTINGUISHED in *O'Hara v. King*, 52 Ill. 305, from the case of public offices, where, it is said, persons may enter and stay, though from motives of curiosity, during the hours for transaction of public business.

LAMPARTER v. WALLBAUM.

[45 ILLINOIS, 444.]

TENANT'S RIGHTS OF POSSESSION OF DEMISED PREMISES ARE NOT IN ANY SENSE LOST OR IMPAIRED by the entry of a person under direction of the landlord, for the purpose of making repairs or improvements, and he, the tenant, still has the right to go upon any part of such premises, though in the place (here a cellar) where the repairs are being made, and having such right, his clerk or servant has the same right, if made necessary by the duties of his employment.

PERSON MAKING REPAIRS UPON DEMISED PREMISES BY LANDLORD'S DIRECTION IS LIABLE for injuries caused by his negligence to the servant of the tenant, where the latter has not materially contributed to the injury.

ACTION for damages for personal injuries. The opinion states the facts.

Copeland and Cram, for the plaintiff in error.

Hervey, Anthony, and Galt, for the defendant in error.

By Court, LAWRENCE, J. The defendant, Wallbaum, was employed by the owner of a building, occupied as a store, in the city of Chicago, to excavate a cellar underneath it. The building had been raised and placed on posts. While the defendant's servants were excavating, a lady, who was a customer of the store, was passing, and in doing so her hat blew

off and fell into the cellar. She stepped into the store and requested the plaintiff, who was the clerk, and at the time was alone, to go into the cellar and bring her hat. He went, and while there the building fell and injured him. To recover damages for these injuries he brought this suit. The declaration charges negligence against the defendant in the manner of making the excavation, and evidence was offered for the purpose of proving it. After the proof was heard, the court gave the following instruction for the defendant:—

“The court instructs the jury, as matter of law, that it being admitted in this case that the plaintiff in this cause, a clerk of the occupant of the store in the building which fell, and there at the time of the injuring the plaintiff, was under the building when it fell for a purpose not connected with his duties as such clerk, and in consequence of being under the building, received the injuries complained of, then the jury are instructed that the plaintiff’s duty as such clerk did not require or justify him in going under the building for the purpose admitted, and therefore the court instructs the jury that the plaintiff in this case, under the facts admitted, cannot recover, and the jury should find for the defendant.”

It will be observed the court, in taking the case from the jury on the agreed facts referred to in the foregoing instruction, holds the plaintiff to have had no right to go under the building for the purpose specified, and that he was injured in consequence of his own wrongful act, and cannot therefore recover. In this view we cannot concur. The defendant had no exclusive possession of the cellar where he was excavating. He was there only for that purpose, and his possession was consistent with the continued possession of the plaintiff’s employer, who had the store. The latter was not ousted by the defendant. He had still the right to go upon any part of the premises held by him under the owner; and having that right himself, his clerk or servant had the same right if made necessary by the duties of his employment.

The person who lost her hat is described in the record as “a lady customer of the store.” She requested the clerk to procure it for her, a thing doubtless of difficult accomplishment for herself in consequence of the character of the excavation. Not only ordinary courtesy and kindness required the clerk to comply, but compliance was required by a proper regard for the interests of his employer. It hardly needs to be remarked that the interest of the master of a retail shop imposes upon

his employees the duty of civility towards the public at large, and especially towards those who deal with him. It would have been an act of gross incivility on the part of this clerk if he had refused to procure the lady's hat, and would doubtless have met the severe censure of his employer. In this view of the case, this instruction errs in telling the jury that the plaintiff's duty as clerk did not justify him in going under the building. He was there in the right and interest of his employer, who had not lost possession by the entry of defendant for the purpose of excavation. A tenant does not lose possession in any sense that would impair his own rights merely because a person enters under the direction of the landlord to make repairs or improvements.

This instruction for the defendant should have been refused, and the jury should have been told that if the injury complained of was shown by the evidence to have been occasioned by the carelessness of the defendant or his employees in excavating, they should find for the plaintiff, unless they believed from the evidence that the plaintiff by his own fault or negligence materially contributed to the injury; and that he had the right to enter the cellar for the purpose stated in this record, using reasonable care and prudence, and not obstructing the work of the defendant.

The judgment must be reversed and the cause remanded.
Reversed and remanded.

SCHWARTZ v. GILMORE.

[45 ILLINOIS, 454.]

EVERY MAN MUST SO USE HIS OWN PROPERTY AS NOT TO INJURE HIS NEIGHBOR; and if, through want of reasonable care or skill on the part of himself or his servants, he fails to do so, he must respond in damages.

OWNER OF PROPERTY IS NOT INSURER TO ALL THE WORLD against injury from its use or condition; he is liable only for injury arising from a failure to exercise the same intelligence, prudence, and care in regard to his property for the security of others that prudent men would exercise toward their own.

OWNER OF PROPERTY UPON WHICH BUILDING IS BEING ERECTED is not generally liable for injury resulting from the negligence of the contractor or his servants, where entire possession has been surrendered to the latter, and he proceeds with his work according to his own judgment, and is not subject to the control or interference of the owner. But if the injury was caused or contributed to by the fact that the plans for the building were essentially defective, the owner as well as the contractor would be liable.

OWNER OF PROPERTY HAS NOT SO FAR GIVEN ITS CONTROL TO CONTRACTOR for building as to be relieved from liability for the contractor's negligence, where by the terms of the contract the builder is to carry forward the work under the control of a superintendent, and "to remove all improper work or materials upon being directed to do so by the superintendent," to whose judgment, both as to work and materials, he agrees to submit, and whose acts the owner agrees to recognize, and the owner also reserves the right to change his plan, and the architect is declared to be the superintendent for the owner.

OWNER OF BUILDING WILL NOT BE HELD LIABLE FOR DAMAGES caused by falling of the walls of his building, though it appears that he was informed on Sunday, the day previous to the injury, that the walls were settling and leaning, and had said that he would attend to the matter, but really did not do so on that day, unless it also appears that the danger was so obvious that a reasonable and prudent man, the safety of whose person and property depended upon the walls, would have taken immediate measures on that day to have secured them.

ACTION for damages for personal injuries. The opinion states the facts.

Fuller and Shepard, for the plaintiff in error.

Garrison and Blanchard, for the defendant in error.

By Court, LAWRENCE, J. In July, 1866, Schwartz, the plaintiff in error, commenced the erection of a brick building in the city of Chicago, 25 feet in width, 120 feet in depth, and four stories in height. On the night of Sunday, the 21st of October, 1866, the rear and two side walls having been carried to their full height, the greater part of the side walls fell during a heavy gale of wind, and crushed in their fall the house of the defendant in error, which stood near. He had a barber's shop in the house, and lived in it. His wife was killed, he was severely injured, and all his property in the house was destroyed. He brought an action against Schwartz, and recovered a verdict and judgment, to which Schwartz has prosecuted a writ of error.

This suit is based on the theory that the plan of the building was defective, and that the walls were hastily and carelessly erected, with the consent and sanction of Schwartz. It is insisted, on the other hand, that the plan was unobjectionable, and that so far as there was any want of care or skill in the erection of the walls, Schwartz was not responsible. A plan had been prepared by an architect and adopted by Schwartz, and he had entered into a contract with one Daegling to erect the walls in conformity with the plan, and under the superintendence of the architect.

The law which governs cases of this character is not doubtful, though not always easy of application. It rests upon the principle that every man must so use his own property as not to injure his neighbor; and if, through the want of reasonable care or skill on the part of himself or his servants, he fails to do so, he must respond in damages. This court held, however, in the case of *Scammon v. City of Chicago*, 25 Ill. 424 [79 Am. Dec. 334], that the owner of property who has contracted with a builder to erect a building upon it is not liable for the negligence of the contractor or his servants, where entire possession has been surrendered to him, and he proceeds with his work according to his own judgment, and is not subject to the control or interference of the owner. We have no doubt of the correctness of that rule, and are not disposed to depart from it. But the case before us is not of that character. Here, although Daegling was erecting the walls under a contract, he was by its terms to carry forward the work under the control of the superintendent, and "to remove all improper work or materials upon being directed so to do by the superintendent," to whose judgment, both as to work and materials, he agreed to submit, and whose acts the owner agreed to recognize. The owner also reserved the right to change his plan, and the architect was declared to be the superintendent for the owner.

With these provisions in the contract, it cannot be said the owner had so far given to the contractor all control over the work and the premises as to be relieved himself of all responsibility; and the first instruction for the plaintiff, to which exception is taken, was therefore unobjectionable.

We are of opinion, however, that the second instruction as given for plaintiff was calculated to mislead the jury. It appears that on Sunday, the day before the building fell, the occupant of a house on the south side of this building, the windows of which had been darkened by the new walls built close upon them, discovered that more light entered at these windows, and hence concluded the walls of the new building were settling, and leaning to the north. In the course of the day he called the attention of Schwartz to this, and there was some conversation and speculation among the by-standers as to whether the walls really leaned. Schwartz had not observed it until the witness called his attention to it. One by-stander thought they leaned two inches, another three, and a third gave it as his opinion that it would do no harm. Schwartz said he would see his architect, and have it made

right. On these facts, the court gave the following instruction:—

“If the jury believe, from the evidence, that the defendant had the possession and control of the premises which the building was on, and was present on Sunday previous to the falling of his building, and was informed that the walls then up were leaning over and in danger of falling; if in fact they were so leaning and in danger, and that thereafter the defendant had a sufficient time to have secured the walls and prevented the accident, or to have caused his mason to have done so, then the defendant is liable for the injury done the plaintiff in consequence of the falling building, notwithstanding the defendant may have employed Daegling to erect his walls under a special agreement, subject to the same qualification as to the knowledge of the danger by the plaintiff as in the plaintiff's instruction just given.”

This instruction proceeds upon the theory that Schwartz was liable, in the contingency named in the instruction, independently of all question as to the character of the plan or the manner of its execution. Even if he had been chargeable with no fault up to that time, this instruction makes him liable for all damages for failing to secure the walls in case he had time to do so after his attention was called to their condition. But it is clear that would depend, not on the fact that the walls were really leaning and in danger of falling, and that his observation was called to them, but on the fact whether their condition was such as to excite the apprehensions of a reasonable and prudent man; such, in short, that a reasonable and prudent man would have taken immediate steps for the security of his own person and property, if exposed in the mean time to the same danger with that of the plaintiff. The distinction in this case is very material. The jury, on reading this instruction, would say: “The building was really in danger, for it fell the next night; there is no dispute but that his attention was called to it; and as he did nothing to arrest the danger, we must, under this instruction, find him guilty.” Yet he is not liable on this ground unless he omitted a duty, and the law requires of the owners of property, not an absolute and perfect knowledge of all dangers that may arise to others from a particular use or condition of such property, not that they shall be insurers to all the world against injury in any contingency, but only that they shall exercise the same intelligence, prudence, and care in regard

to their property for the security of others that prudent men would do for their own. This instruction, then, should have been so modified that the jury would not have understood the liability of Schwartz to be settled by the mere fact that his attention was called to the walls on Sunday, and that they were in fact leaning, however difficult of perception their inclination, and however slight the appearance of danger. They should have been told, in connection with this instruction as asked, that he was not liable merely on the ground that he did nothing on Sunday to secure the walls, unless the danger was so obvious that a reasonable and prudent man, the safety of whose person and property depended upon these walls, would have taken immediate measures to have secured them.

The counsel for plaintiff in error insist that the court erred in refusing a portion of the instructions asked by them. We are of the opinion, however, that it gave all to which they were justly entitled. The jury were told, if the injury happened only in consequence of the negligence or want of skill of the contractors, and that Schwartz neither directed nor sanctioned such manner of doing the work, nor had control of the premises, he would not be liable. The same instruction, with the important word "only" omitted, was properly refused, because, even if the negligent manner of doing the work was the proximate cause of the fall, yet if the plan was essentially defective, and such defect contributed to the accident, the owner as well as the contractor would be liable. The eleventh, twelfth, and thirteenth instructions were properly refused, because if the architect had control of the work and knew the walls were unsafe from want of bracing, he could not relieve his principal from responsibility by merely directing the bracing to be done. He should have seen that it was done.

As this case is to go before another jury, we have abstained from all comment on the evidence, and reverse the judgment for the error in the second instruction for the plaintiff.

Reversed and remanded.

LIABILITY OF EMPLOYER FOR NEGLIGENCE OF CONTRACTOR: See *City of Detroit v. Corey*, 80 Am. Dec. 78, and note. The principal case is cited in *City of Chicago v. Joney*, 60 Ill. 387, to the point that when a contractor is under direction and control of his employer, the employer is liable for his negligence.

DUTCHER v. BECKWITH.

[45 ILLINOIS, 460.]

AUTHORITY TO COLLECT DEBT IS NOT IMPLIED MERELY FROM POSSESSION, by the party claiming the authority, of a copy of the account.

AUTHORITY TO COLLECT DEBT. — A and B went to a store, and each purchased a bill of goods. A guaranteed the payment of B's bill. Subsequently both bills were sent by mail to A, who presented B's bill to him, representing that he had authority to collect it, whereupon B paid it. *Held*, that the mere delivery of the bill by the creditor to A, through the post-office, did not constitute A the creditor's agent for the collection of the debt, nor was it any evidence of authority to collect it.

DEBTOR IS BOUND TO KNOW AUTHORITY OF THIRD PERSON TO WHOM HE PAYS MONEY on account of his creditor, and if, failing to ascertain such authority he makes the payment, it is at his own risk.

ASSUMPSIT. The opinion states the facts.

Storrs and Johnston, for the appellant.

Tyler and Hibbard, for the appellee.

By Court, WALKER, J. This was an action of *assumpsit*, brought by Charles H. Beckwith, in the superior court of Chicago, against Elisha W. Dutcher, to recover the price of a bill of groceries delivered to him. It appears that F. W. Dutcher, appellant's brother, acting as his agent, went to appellee's store in Chicago with one Aaron W. Pitts, a customer of appellee, and purchased for appellant a bill of groceries amounting to \$149.40, and Pitts guaranteed the payment. The goods were charged to appellant on the books of appellee, and the agent saw the entry made. It appears that Pitts purchased of appellee a bill of goods at the same time appellant received his goods.

Soon after the sale Pitts received the two bills for the goods, inclosed to him in an envelope, one for his and the other for appellant's goods. Soon after the bills were received, Dutcher was at Pitts's hotel, in Dixon, when the latter handed the former the bill for his goods, and stated to him that it had been sent to him for collection. Appellant paid the amount of the bill to Pitts. It appears that the envelope contained nothing but the two bills. The case was tried by the court, a jury having been waived by consent of parties. The court found the issues for plaintiff below. A motion for a new trial was entered, and was overruled by the court, and judgment was rendered against defendant, and he brings the case to this court to reverse the judgment.

There is no pretense that appellee ever conferred upon Pitts any other authority to collect the debt than by sending the bill for appellant's goods to him. But appellant insists that the mere delivery of the bill through the post-office constituted him his agent for the collection of this debt, without other or more ample authority. And the case is likened to the payment of money by the maker of a bond, bill, or note, to the holder, when it will be presumed that he had authority to receive the money, and the owner of the instrument will not be permitted to question his authority.

According to commercial usage, such instruments are bought and sold by mere delivery, so as to vest in such a holder the beneficial interest. Hence, the mere possession of such instruments is evidence of ownership of the beneficial interest. It therefore follows that a payment to any holder, without notice that it is wrongful, will protect the maker. But it is not so with mere accounts. The fact that a person has the copy of an account against another person is no evidence that he is the owner, nor is it any evidence of authority to collect it.

It is, however, asked why did appellee send this bill to Pitts, if he did not intend he should collect it as his agent. It seems to us the answer is obvious. Pitts had guaranteed the payment, and appellee no doubt intended it as a notice to him that the time for payment had elapsed, and that if he desired to discharge himself from liability for its payment as guarantor, he should see to it that it was paid. No reason is perceived why either Pitts or appellant should have supposed that the mere possession of the bill could confer authority to collect the money. It was appellant's duty to know that the person to whom he paid the money had authority to receive it. Failing to do so, the payment was at his own risk. We perceive no error in this record, and the judgment must be affirmed.

Judgment affirmed.

PERSON PAYING MONEY TO ANOTHER AS CREDITOR'S AGENT is bound to inquire into the authority of such agent to receive the payment, or it is made at his own risk: See *Cooley v. Willard*, 85 Am. Dec. 296.

WEBSTER v. CONLEY.

[46 ILLINOIS, 13.]

GUARDIAN MAY LEASE ESTATE OF WARD in the manner provided by statute; but where the statutory method is not observed, the lease is of no validity. Such a lease is governed by the common law; and guardians at common law except in chivalry could not lease the estate of their wards; and guardianship in chivalry is unknown to our law.

LEASE BY GUARDIAN. — ACTION OF COVENANT ON WORDS "DEMISED AND LEASED," brought by tenant under a lease by a guardian, who had afterwards been evicted by a subsequently appointed guardian, will not lie against the first guardian. These are not express covenants, and the lease being void, the implied covenants at least must fall to the ground.

IMPLIED COVENANTS NOT BINDING UPON OFFICERS. — Where officers or persons in representative capacity, in executing deeds or leases, use words from which implied covenants would arise against individuals, they are not bound by such, but are only concluded by express covenants.

COVENANT. The opinion states the case.

Williams and Thompson, for the appellant.

Barker and Tuley, for the appellee.

By Court, WALKER, J. This was an action of covenant, brought by Richard Webster in the superior court of Chicago, against Philip Conley, on the words "demised and leased," which were contained in a lease. The facts as averred in the declaration substantially are, that appellee was the sole guardian of an infant, Alice Radin, who owned the premises; appellee, as such guardian, leased the premises to appellant, the mother of the infant joining in the lease, for the term of five years; that the lease was never approved by the judge of the county court; that some two years after appellant had taken possession and made improvements thereon, appellee was removed from his guardianship, and one Sherlock was appointed in his place; that Sherlock evicted appellant and gave him a new lease at a largely increased rent; and damages are claimed for the injury sustained by the breach of the covenant, and it is insisted that they are the difference between the rent reserved by the original lease and the yearly value of the premises at the time of the eviction.

Appellee filed a number of pleas, to a portion of which appellant demurred. The demurrer was overruled by the court, to the sixth, seventh, and eighth pleas, and appellant not having replied to them, the court rendered judgment in bar of the action; which is assigned for error. These pleas, in substance, presented the same defense. After reciting the facts

contained in the declaration, they averred that at the time the lease was executed, appellant knew "that said Alice was the owner of said premises, and entitled to the rents and profits thereof; that defendant in making the indentures acted solely as such guardian, and not in any way or manner for himself; and that the indentures were never approved by or made under the direction of the judge of the county court." Do these facts as admitted by the demurrer constitute a defense?

By section 134 of the statute of wills, executors and guardians are authorized to mortgage or lease real estate, but such mortgage or lease is not permitted for a longer term than until the minor shall arrive at age. And section 135 declares that before any such mortgage or lease shall be made as aforesaid, the executor or guardian shall petition the court of probate for an order authorizing such mortgage or lease to be made, and which the court may grant if the interest of the estate shall so require. It also declares that the executor or guardian upon obtaining such order shall enter into bond with good security for the faithful application of the money. And the eighth section of the guardian act also declares that guardians shall have power to lease the real estate of the ward upon such terms and for such length of time as the court of probate shall direct; provided such leasing shall never be longer than during the minority of the ward; and the minority of females is declared to cease at the age of eighteen years. There is no pretense that the lease under consideration was executed under these statutory provisions. It must, therefore, with all its provisions, be governed by the common law. Then what was its force, if it had any, at common law?

A guardian at the common law, except in chivalry, had no power to lease the real estate of the ward, and that species of guardianship is unknown to our law. In the case of *Roe ex dem. Parry v. Hodgson*, 2 Wils. 129, 135, it was held that a lease made by a guardian, running beyond the minority of the ward, was void. Again, the case of *Knipe v. Palmer*, 2 Id. 130, holds that covenant on a lease made by the committee of a lunatic will not lie, because such committee cannot make such a lease at law; "that the lease was void, for the committee had no power to make the lease." And the court also held that "all the covenants in this case run with the land, and the deed being void, all of the covenants fall to the ground"; also that the committee had an authority only, but not coupled with an interest. In that case, as in this, it was urged that

as that was an action of covenant, and was founded in contract, the action lay whether the plaintiff had anything in the land or not, and it might be good as a contract although the lease be bad, and authorities were cited in support of the position. But Chief Justice Willes replied, that the authority referred to in that case was where the covenant was collateral to the land; and all the covenants in the case at bar were such as run with the land. In delivering his opinion, he further said: "I think the lease is void; a covenant in a lease to do a collateral thing might bind, though the party had no power to make a lease." Clive, J., said that the lease was certainly void, and as all the covenants run with the land, the lease being void the covenants fell to the ground. Thus it is seen, in both classes of cases, the lease was held to be void.

Even if express covenants could be regarded as binding in such cases, we are at a loss to perceive how implied covenants can have that effect. The lease being made without authority, and both parties being presumed to know the law, we can hardly suppose that it was understood by them that appellee warranted the title, or that he had legal authority to make the lease. If such had been their intention, express covenants would have most probably been inserted. Sheriffs, masters in chancery, executors, administrators, and other agents of the law, are almost, as a matter of necessity, compelled, in executing their duty in conveying lands, to use terms which imply covenants for title when used in a deed of conveyance by a private individual. In such cases it would be unreasonable to hold that such officers and agents of the law were liable on implied covenants. The operative words of conveyance prescribed in a sheriff's deed are such as would imply a covenant in the deed of a private individual.

In the case of *Dow v. Lewis*, 4 Gray, 473, it was held that in a feoffment at common law, the word *dedi* implied, in the absence of express covenants, a warranty during the life of the grantor. The court say: "But we know of no authority or sound reason for extending this technical rule to an instrument which purports to be and is but the execution of a power given by statute, and in which the grantor neither assumes to have nor to convey any estate or interest of his own." Nor do we see any sound reason why a guardian, attempting to exercise a mere naked statutory power of leasing the property of his ward, or in attempting to lease it without power, should be held liable on implied covenants in a void lease.

As the British court said, "When the lease is void, the implied covenants at least must fall to the ground." And the same would no doubt be true in case the title failed, even where the lease was authorized and approved by the probate court. We for these reasons are of the opinion that the judgment of the court below must be affirmed.

Judgment affirmed.

GUARDIAN MAY LEASE HIS WARD'S REAL ESTATE: *Palmer v. Oakley*, 47 Am. Dec. 41, and note.

COVENANTS IMPLIED IN LEASE FROM USE OF WORD "DEMISE" OR "LEASE": See *Crouch v. Fowle*, 32 Am. Dec. 350; *Black v. Gilmore*, 33 Id. 253, and notes.

LAW DOES NOT IMPLY COVENANTS of warranty on part of one who acts merely as its organ for the purpose of transferring property: *Evans v. Dendy*, 42 Am. Dec. 356.

ALLISON v. ALLISON.

[46 ILLINOIS, 61.]

WILL—SUFFICIENT PUBLICATION AND ACKNOWLEDGMENT TO WITNESSES.—

Testator had his will written in the house; went out and called the two subscribing witnesses from a field; said he wanted them to come and sign a paper. They went into the house; the scrivener read over to them the attesting clause, the testator being present in the room, and after the reading the testator handed the pen to the witnesses, who signed the instrument. No words were spoken during this time. *Held*, a sufficient acknowledgment by testator that it was his will.

WILLS.— Statute does not require that acknowledgment that instrument is will be made in words or by means of language; any act which indicates the same thing with unmistakable certainty will answer as well.

WILLS—PROOF OF SOUND MIND.— Subscribing witnesses must swear that they believe the testator was of sound mind, before his will can be admitted to probate. Where one of them testifies that he does not know whether he was or not, — that he might have been or might not, — this is insufficient. He should be interrogated as to his belief. While he may have no positive knowledge, he undoubtedly has an opinion which the law requires he should state.

THE opinion states the case.

Ingersoll and Puterbaugh, for the appellants.

Grove and Williamson, for the appellees.

By Court, LAWRENCE, J. This was an application to admit to probate the will of Daniel Allison, deceased. It is urged by the counsel for appellants that the proof made by the sub-

scribing witnesses, of the execution of the will, is insufficient. That proof is as follows: Allison came out of his house and called Hoyt and Walsh, the subscribing witnesses, from the field, to come in and sign a paper. They went in where Allison and Kingsbury were,—Kingsbury had just drawn the will. He read over to them the attesting clause, Allison sitting in the room within hearing distance. Allison then handed the pen to Hoyt, who, having himself signed, handed it to Walsh, who also signed. Allison said nothing that witnesses could remember.

The chief objection taken to the proof is, that Allison did not sign the will in the presence of the subscribing witnesses, or acknowledge it to be his act and deed, as required by the statute.

It is true, the testimony shows no formal acknowledgment, in set terms, or by words to that effect, and yet the entire transaction amounts to an acknowledgment as distinct and satisfactory as language could have made it. Kingsbury, whose testimony was competent to show that fact, had just written the will at the request of Allison, who had sent for him for that purpose. The will bore Allison's signature. He went out to procure subscribing witnesses, and brought in Hoyt and Walsh. Kingsbury then read over the attesting clause, as already stated. This recites that the instrument was the will of Daniel Allison, declared by him to be such, and that he had acknowledged to them, and each of them, that he had signed and sealed the same, and that they signed it as witnesses, at his request and in his presence. After all this was read aloud and in Allison's hearing, he hands them a pen to sign, and they do sign this clause in his presence. Could words make a plainer acknowledgment than this series of acts? The statute does not require the acknowledgment to be in language. Any act which indicates the same thing with unmistakable certainty will answer as well; and when the testator, in the present case, having heard the attestation clause read, reciting that he had executed the instrument as his will, handed the subscribing witnesses the pen and saw them sign, although he uttered not a word, he really acknowledged the instrument to be his will as satisfactorily as if had said: "I, Daniel Allison, do acknowledge this instrument to be my last will and testament." In matters of this sort we must look at the substance rather than the form. This view of a similar question is taken in *Nickerson v. Buck*, 12 Cush. 332; *Peck*

v. *Cary*, 27 N. Y. 9 [84 Am. Dec. 220]; and *Nelson v. McGiffert*, 3 Barb. Ch. 158 [49 Am. Dec. 170].

The proof, however, is defective in one respect, though the defect may probably be cured at another trial. Our statute requires, before a will can be admitted to probate, that the subscribing witnesses shall swear they believe the testator to have been of sound mind and memory. One of the witnesses in this case testifies he does not know whether Allison was of sound mind or not,—he might have been or might not. Probably what the witness meant to say was, not that he had any reason to suspect unsoundness, but he could not swear positively and as a matter of fact what the condition of the testator's mind was. But the witness should have been interrogated as to his belief. Although he had no positive knowledge, he undoubtedly had an opinion on this point, and this opinion or belief the law requires as indispensable to probate. It is true, as suggested by counsel, the law presumes all men to be sane until the contrary appears, but this proof of belief is, in this case, a statutory requirement with which we cannot dispense. The order of the circuit court is reversed and the cause remanded for further proceedings.

Judgment reversed.

WHERE PERSONS ARE REQUESTED TO WITNESS WILL IN PRESENCE AND HEARING OF TESTATOR by one who has draughted such will at testator's request, and they accordingly then and there sign such will as witnesses, they must be deemed to have done so at the testator's request. The publication of a will is sufficiently proved when the attesting clause is in proper form, and it appears from the evidence that the witnesses were called into a room where testator and the draughtsman of the will were; that the draughtsman stated that the testator was going to sea, and was about making his will, and wished them to witness it, although the witnesses cannot remember that anything was said by the testator: *Peck v. Cary*, 84 Am. Dec. 220, and note.

OPINION AS TO TESTATOR'S MENTAL CAPACITY: See *Turrell v. Brennan*, 82 Am. Dec. 137; *Rumyan v. Price*, 86 Id. 458.

ILLINOIS CENTRAL R. R. Co. v. JEWELL.

[46 ILLINOIS, 99.]

BRAKEMAN MUST SEE THAT BRAKE IS IN REPAIR; COMPANY IS NOT LIABLE FOR HIS FAILURE TO DO SO. Where a brakeman was thrown from a railroad car and killed by reason of the brakehead coming off the upright shaft, through the nut at the top being loose and coming off, the company will not be liable, as it was the brakeman's duty to see that the brake was in good repair and in fit condition for use, and to report its defects to the company.

FELLOW-SERVANTS — RAILROAD COMPANY, WHEN LIABLE TO ONE SERVANT FOR NEGLIGENCE OF ANOTHER. — Where a railroad engineer is wild, reckless, and careless, and is going down grade at such an improper and excessive rate of speed as to necessitate the setting of the brakes, and where the setting of the brakes caused the train to oscillate violently, throwing the brakeman from the train and killing him, the railroad company is liable for damages for such killing, if the incompetence of the engineer was so generally known that they would be held to a knowledge of it.

THE opinion states the case.

McAllister, Jewett and Jackson, and Cook, for the appellants.

King, for the appellee.

By Court, BREESE, C. J. This was an action on the case brought by Maria B. Jewell, as administratrix of William B. Jewell, in the circuit court of Cook County, against the Illinois Central Railroad Company, to recover damages for the death of her son, the intestate, on the allegation of negligence in the company in permitting the use of a defective brake on the car in which the deceased was employed as a brakeman, and on the further allegation of the employment of an incompetent engineer.

There was much evidence on these points, and the jury found a verdict for the plaintiff. The court rendered a judgment on the verdict, a motion for a new trial having been overruled.

To reverse this judgment, the defendants bring the record here by appeal, and assign various errors, questioning the correctness of the instructions given for the plaintiff, and the refusal to give instructions asked by the defendants, and in modifying those given in their behalf. They also urge the refusal of the court to grant a new trial as error.

The theory of the plaintiff below was, that the accident was caused by a defect in the brake, the nut which kept the wheel in its place on the upright shaft having become loose, and in

the effort to work the brake the wheel came off, and the deceased was thrown to the ground. The fact that the brakeman was found dead on the track, with the wheel or brakehead near him, and the brakehead of the car on which he was employed being gone, gives support to this view.

We are not inclined to hold that this was such negligence as to charge the company, for the condition of the brake was matter under the special care of the brakeman, and it was his business, at all times, to see that it was in a fit condition for use, and report defects to the company. The company are not to suffer for his negligence of a plain duty.

On the other ground, that the company employed an incompetent engine-driver, the evidence is conclusive on that point, that Chapman was incompetent, and known to be so by the company. Booth, who seemed to know him well, said, as a driver, "he was a very reckless man, a wild, harum-scarum fellow; was a reckless, wild runner; he would n't hear to anybody"; and Hay says "he got to drinking too much."

Shepard says he was headstrong and reckless,—inattentive to his watch and time-card,—and he considered it necessary to watch him; another witness, Peabody, says he was not competent; rather reckless, and inclined to fast running. To have such a man in charge of the lives and property of the people is an act of negligence for which the company employing him, and who are bound to know the qualifications of their employees, ought to be responsible.

But it is asked, How did this incompetency of the driver tend to produce the casualty?—for if he was incompetent, and the accident and death were not caused by that, the company should not be charged.

This is reasonable, and it is found in the fact that with a freight train of eighteen or twenty-five cars on a down grade the rate of speed was from twenty-five to thirty miles an hour, when it should not have been half that rate. It is the experience of all travelers on railroads that the sudden application of the brakes to a train at such a high rate of speed always produces great oscillation of the train, and would so disturb a brakeman tugging at the wheel as to throw him off if the wheel gave way,—there would be no help for him. If the speed of this train had been moderated on approaching the down grade, it would have reached the station by its own momentum without any steam, and no necessity would have presented itself for this straining at the brake.

It is said this driver presented good recommendations when he was employed. This is all very well; but it is almost impossible that the active agents of the company should not have known of his subsequent recklessness and his inclination to drink. Why should not railroad companies, for their own sakes if not for the public, institute and keep up inquisitorial examinations periodically among the engine-drivers they employ, and among other employees, so that the unfit may be condemned and discharged, and thus afford some protection to the countless lives and unnumbered property committed daily to their care? Public safety requires the greatest precautionary measures to be taken by these companies, who have so many dangerous machines in their use and control, that they shall not leave destruction of life and property in their path as they sweep in their terrific power over our state. That this casualty was caused by the recklessness and incompetency of this engine-driver, we have no doubt, and the jury have so found.

We have examined the instructions, and perceive no error in them that could have misled the jury, and they embody the law as we understand it.

Judgment affirmed.

PLAINTIFF MUST PROVE DUE CARE ON HIS OWN PART in order to maintain an action to recover damages for a personal injury caused by the negligence of another: *Gilman v. Eastern R. R. Corp.*, 87 Am. Dec. 635; master is bound to use ordinary care in providing suitable structures, engines, tools, and apparatus, and is liable for his failure in this respect: *Id.* An employee is liable for injuries to servants or workmen which happen by reason of improper or defective machinery and appliances used in the prosecution of his work: *Snow v. Housatonic R. R. Co.*, 85 Id. 720.

LIABILITY OF EMPLOYER FOR INJURIES TO EMPLOYEE FROM DEFECTIVE MACHINERY OR MATERIAL: See full discussion of this question in the note to *Buzzell v. Laconia Mfg. Co.*, 77 Am. Dec. 218.

FELLOW-SERVANTS — RAILROAD COMPANY WHEN LIABLE TO ONE SERVANT FOR NEGLIGENCE OF ANOTHER: See a full discussion of this question in *Gilman v. Eastern R. R. Co.*, 90 Am. Dec. 210.

THE PRINCIPAL CASE IS CITED to the point that while it is the duty of a brakeman to see that his brake is in good condition and fit for use, this duty does not extend to hidden or inherent defects, in *Chicago etc. R. R. Co. v. Jackson*, 55 Ill. 495. It was cited to the point that a master is liable to a servant for injuries happening to him through insufficient or defective machinery, or through incompetent servants, in *Ryan v. Chicago & N. W. R. R. Co.*, 60 Id. 174; *Chicago etc. R. R. Co. v. Jackson*, 55 Id. 497; *Columbus etc. R. R. Co. v. Troesch*, 68 Id. 550; *Chicago etc. R. R. Co. v. Taylor*, 69 Id. 465; *Toledo etc. R. R. Co. v. Durkin*, 76 Id. 395. The principal case is distinguished upon this point in *Malone v. Western Trans. Co.*, 5 Biss. 318. It

is cited in *Toledo etc. R. R. Co. v. Eddy*, 72 Ill. 140, to the point that it is the duty of a servant using machinery to see that it is in repair, and when not, to report it to his employer, and that his failure to do so is such negligence as will relieve his employer from the consequences. It is again cited in *St. Louis etc. R'y Co. v. Britz*, 72 Id. 261, to the point that an employee is presumed to have contracted with reference to the risks of his service.

KELLY v. AUSTIN.

[46 ILLINOIS, 156.]

FIXTURES — HOUSE WHEN CAN BE REMOVED AS. — Where a person mortgages a piece of ground, and afterwards forms a partnership with a third person, and they together build a carpenter-shop upon the land, without letting it into or attaching it to the ground, and in a manner which indicated an intention that it should not be permanent, and where the mortgage is afterwards foreclosed and the land sold, the building may be removed by the partners.

MORTGAGOR MAY MAKE TEMPORARY ERECTIONS UPON MORTGAGED PREMISES, AND REMOVE THEM before the mortgage is foreclosed, if they are not attached to the freehold and do not depreciate the value of the security as it existed when the mortgage was given. The right of a third party who has made such an erection is much more absolute and extensive.

INTENTION WILL NOT ALWAYS DETERMINE WHETHER STRUCTURES BUILT UPON LAND ARE REAL OR PERSONAL PROPERTY, but in cases of doubt it will have a controlling influence.

TRADE FIXTURES. — Structures or improvements made to be used for the purposes of trade, or trade fixtures, may be removed by a lessee, when as between executor and heir, or vendor and vendee, the same things would be held to constitute part of the realty.

APPELLANT, being the owner of some land, mortgaged the same to one Gibbs. Afterwards, and before the mortgage became due, appellant formed a partnership with a third party to carry on the carpenter and joiner business, and the two with firm funds built a carpenter-shop upon the land. Gibbs foreclosed the mortgage when it fell due, and the appellee became the purchaser of the land. Afterwards appellant prepared to remove the shop from the premises, and appellee filed this bill to enjoin him from so doing. Upon a hearing the court below decreed a perpetual injunction against appellant.

Hervey, Anthony, and Galt, for the appellant.

Robinson, for the appellee.

By Court, WALKER, J. This record presents the question whether the building erected upon the lot which was sold

under the mortgage was permanent and fixed in its character, and formed a part of and passed with the ground when it was sold; or was it temporary, and so far detached as not to form a part of the realty? It was placed on the lot several months after the mortgage was given, by the mortgagor and his partner, in the house-joiner business. It was placed on the lot by the firm for the use of their business. It seems to have been made of rough materials, slightly built, placed upon blocks resting on boards laid on the surface of the ground. It was not placed on a stone or brick foundation, and in no manner let into the ground; and from the evidence, it would seem to be manifest that it was not intended to be permanent in its character, or to have been placed there as an improvement of the lot, but simply to answer the convenience of the partnership.

It seems that it was not constructed with the funds of the mortgagor, but with labor, material, and means of the firm; and if it did not become a part of the real estate, it was a chattel owned by the partnership. Had the building been of a permanent character, or had it been placed there with the intention of permanently remaining, then it could not be severed without the consent of the mortgagee. Or had it been placed on the lot by the mortgagor, with his own means, it might have presented a different question. But from the character of the structure, and the purpose for which it was employed, it would seem that it was not designed for any other than a temporary use, and to be removed from the lot when the object of its erection was accomplished.

While the intention alone will not always determine whether such structures are real or personal estate, it will have a controlling influence in cases of doubt. Here, the property of a stranger to the mortgage, to the extent it belonged to the partner of the mortgagor, was placed on this lot. And no one could claim that he could have intended it to become fixed, and a part of the real estate, especially when we see the apparent effort and care observed that it should not become attached even so slightly as by the blocks upon which it rested sinking into the soil. That seems even to have been guarded against, so that there could be no claim that it had become attached, and formed a part of the realty.

Even a mortgagor may make temporary erections if they are not attached to the freehold, and remove them before the mortgage is foreclosed, if he does not depreciate the value of

the security as it existed when the mortgage was given. In such a case, a court of equity would not interfere to restrain its removal, much less to prevent the removal of such an erection when placed there by a third party. In this case, the mortgagee has no claim, legal or equitable, to the money or labor of Kelly expended in building this house. Nor does it appear that its removal would not still leave more property obtained under the foreclosure of the mortgage than is amply sufficient to pay the mortgage debt. But if there was not, the mortgagee gets all that was covered by his mortgage, and Kelly is under no moral or legal obligation to make it good.

The law has always been liberal in the promotion of trade by allowing the lessee to remove trade fixtures which, as between executor and heir, and vendor and vendee, would be held to constitute a part of the realty. Hence the law in such cases considers the intention with which they were placed on the land. If erected for the purposes of trade, and not permanently attached to the soil, they might be removed during the term. In this case, the evidence shows that this building was erected to be used as a shop wherein the business of a firm of house-joiners manufactured or prepared materials for buildings; and being temporary in its character, and not permanently fixed to the soil, and Kelly being the owner of an undivided half, we have no doubt that it might be removed against the wishes of the mortgagee. It is the same as if the mortgagor had licensed a stranger to place it there with the right of removal. It then follows that the court below erred in rendering a decree restraining its removal. The decree is reversed, and the cause remanded.

Decree reversed.

HOUSE SITUATED UPON REAL ESTATE at the time that the latter is mortgaged forms a part of the realty, and as such is affected by the mortgage lien. The severance of the house from the land changes its character from real to personal property, irrespective of the means by which the severance was accomplished. While the house is yet upon the mortgaged land, the mortgagor or those claiming under him may remove it, and the removal will not be enjoined except upon proof that the land without the house would be an inadequate security for the debt: *Buckout v. Smith*, 87 Am. Dec. 90, and note. Houses as fixtures: See *Ogden v. Stock*, 85 Id. 332, and note. See also *Bless v. Whitney*, 85 Id. 745; *Johnson v. Wiseman*, 83 Id. 475.

INTENTION AS CONTROLLING whether property be realty or personalty: See *Ogden v. Stock*, 85 Am. Dec. 332.

TRADE FIXTURES: See the law relating thereto in *Johnson v. Wiseman*, 83 Am. Dec. 475, and note.

FINCH v. SINK.

[46 ILLINOIS, 169.]

NOTICE OF APPLICATION FOR ORDER TO SELL REAL ESTATE IS SUFFICIENT WHEN TO FOLLOWING EFFECT: "Notice is hereby given that I will apply at the December term of the county court" for order to sell the following described real estate of the estate of D., deceased, describing it, and concluding by notifying all persons interested to appear and show cause at that time why the order should not be granted, and being dated. That the word "next" did not appear before the words "December term" in the notice is immaterial, as there could be no doubt that the term meant was the next succeeding December one.

NOTICE OF HEARING OF PETITION TO SELL REAL ESTATE IS SUFFICIENT when a reasonable person in the exercise of his ordinary faculties, reading the notice, would be apprised by it in what court and at what term the petition would be presented.

TIME. — NOTICE OF HEARING PETITION TO SELL REAL ESTATE IS SUFFICIENT AS TO TIME of hearing, when the term at which it is to be heard is given, without any day being specified.

PRINTER'S AFFIDAVIT OF PUBLICATION OF NOTICE OF HEARING APPLICATION for sale of real estate cannot be attacked as to its sufficiency in a collateral proceeding.

THE opinion states the case.

Goudy and Chandler, for the appellant.

Blanchard, Leland, and Harris, for the appellee.

By Court, LAWRENCE, J. This was an action of ejectment, in which the defendant derived title through an administrator's sale. It is objected that the court granting the order of sale acquired no jurisdiction because the notice was defective. The notice was as follows:—

"Notice is hereby given, that I will apply at the December term of the county court of the county of Mercer, state of Illinois, for an order to sell the real estate hereinafter described, which is a part of the real estate of J. R. Dennison, deceased, to wit: The old farm containing 160 acres, situated on the northeast quarter of section 34, township 14 north, range 5 west of the fourth principal meridian, in the county of Mercer and state of Illinois. All persons interested in said estate can appear at said time, and show cause, if any they have, why said order shall not be granted.

"B. C. TALLIAFERRO, Administrator.

"Sept. 6, 1852. 6-6w."

This notice is in all substantial respects like that held to be sufficient in *Goudy v. Hall*, 36 Ill. 317 [87 Am. Dec. 217]; except that in that case the word "next" was used in con-

nection with the term of court, and with the month on which the term was to be holden. But the advertisement, unlike the present, bore no date. We sustained the jurisdiction of the court, on the ground that reference might be had to the date of the paper in determining what was meant by the "next term of the Fulton County circuit court, to be held in Lewiston on the second Monday of the month of March next." The reasoning adopted in that case is applicable in the present. We said then, as may be said now, that we are to consider whether a reasonable person, in the exercise of his ordinary faculties, reading this notice, would be apprised by it in what court, and at what term the petition would be presented. In that case, the notice named the circuit court of Fulton County, to be held at Lewiston, but did not name the state of Illinois. We held that a person reading this notice in a paper published at Lewiston, Fulton County, Illinois, would be sufficiently advised that the court referred to was the circuit court of Fulton County, in the state of Illinois. In this case, the notice does not mention the year when the December term was to be held, but no person reading the notice, bearing date "Sept. 6, 1852," could doubt that the December term therein named was the succeeding December term, and not a December term of a future year. We are not willing to overturn titles acquired in good faith, and which the legislature has been so anxious to protect, on objections of this character.

It is objected that this notice did not name the day of the term when the petition was to be presented. The same objection lay against the notice in *Goudy v. Hall*, *supra*, although it was not urged by counsel. But we did not regard it as fatal. We apprehend the more common practice in these cases has been to give the notice for the term, without specifying the day. The statute requires notice to be given of the time and place of presenting the petition. Of course this requires the designation of a particular term, but if we say that it also requires the designation of a particular day in the term, why not go still further, and hold it necessary to name the hour? Because, it may be said, this would be an unnecessary particularity without any benefit. And the same may be said in regard to fixing a particular day. If a day were fixed, the application could very rarely be heard at the appointed time. That would depend on the regular business of the court. Ordinarily, all that could be done would be to file the petition

with the clerk. If no specific day is named, and the heirs wish to resist the application, they can take a rule on the administrator to file his petition by a certain day, if they are inconvenienced by his delay. We are not prepared to hold that the court acquires no jurisdiction merely because the notice does not specify the day of the term.

An objection is also taken to the printer's certificate, but this question cannot be raised in this collateral proceeding. *Non constat* but that the court received other evidence of the publication of the certificate. The judgment must be reversed and the cause remanded.

Judgment reversed.

NOTICES OF SALES OF REAL ESTATE, AND SUFFICIENCY THEREOF, is discussed in *Gibson v. Roll*, 81 Am. Dec. 219, and in the note, where a number of cases are cited. See also *Frazier v. Steenrod*, 71 Id. 447, and note. The principal case is cited to the point that a notice which failed to give the year is sufficient, as a person seeing it in the beginning of the month would know that it referred to that month, in *Waite v. Dennison*, 51 Ill. 322, and *Parmlly v. Walker*, 102 Id. 621.

IRREGULARITY OF SERVICE OF NOTICE of administrator's sale cannot be taken advantage of collaterally: *Overton v. Cranford*, 78 Am. Dec. 244. Sufficiency of notice, publication, or petition calling into action power or jurisdiction of court cannot usually be called into question collaterally, but this rule does not apply to a case where the paper offered is so deficient as not to answer the requirement of the law in any degree: *Frazier v. Steenrod*, 71 Id. 447. The principal case is cited to the point that a printer's certificate of publication cannot be assailed in a collateral proceeding, as the court may have heard other evidence of the publication, in *Sloan v. Graham*, 85 Ill. 29. It is also cited in *Hobson v. Swan*, 62 Id. 153, to the point that the recital in a decree that due notice has been given is *prima facie* evidence of that fact.

WHITING v. NICHOLL.

[46 ILLINOIS, 230.]

PRESUMPTION OF DEATH AFTER SEVEN YEARS' ABSENCE. — When a person goes abroad, and has not been heard of for a long time, the presumption of the continuation of life ceases at the expiration of seven years from the period when he was last heard of. And the same rule holds generally with respect to persons away from their usual places of resort, and of whom no account can be given.

TIME OF DEATH, AT WHAT TIME DURING SEVEN YEARS. — Person once found to be alive is presumed to continue to live until there be proof to the contrary. At the end of seven years from the time he was last heard of, the presumption of life ceases, and the presumption of death takes its place. The legal presumption establishes not only the fact of death, but also the time of death.

SHORTER PERIOD OF ABSENCE THAN SEVEN YEARS WILL NOT SUFFICE TO RAISE PRESUMPTION OF DEATH, but a party to whose interest it is to show that he was alive within that time is at liberty to do so by such facts and circumstances as will inspire that belief in the minds of the jury. The party who claims a benefit or interest in his being alive within the seven years must prove it.

TIME OF DEATH OF PERSON WHO CANNOT BE FOUND is presumed to be seven years from the date upon which he was last heard from; but the person to whose interest it is to show that he died before that time may rebut this presumption by showing from facts and circumstances that his death in all probability happened before that day, or at any particular day between that time and the day he was last heard from.

PETITION claiming dower, filed March 14, 1866. The facts of the case are principally stated in the opinion. Appellee's husband was last heard from March 21, 1852, and she insists that he was to be presumed to be alive for seven years after that date, or until March 21, 1859, and that after that he was presumed to be dead, and that her action, having been commenced March 14, 1866, was not barred by the statute of limitations of that period. Appellant claimed that as the action was not commenced for more than thirteen years after the husband was last heard of, appellee was bound to prove that he was alive within seven years prior to the bringing of her action.

Scammon, McCagg, and Fuller, for the appellant.

Cram and Arrington, for the appellee.

By Court, BREESE, C. J. This was a petition filed by Frances B. Nicholl in the circuit court of Cook County, claiming dower in an undivided one third of certain property known as lot 2, and the east ten feet of lot 3, in block 30, in Kinzie's addition to Chicago. The demand for dower was made on Mary E. Whiting, the appellant, on the 2d of May, 1863. The demandant claimed dower as the widow of Edward A. Nicholl, and his title was not brought in question. The defendant set up possession of the premises under claim and color of title derived from a deed of the same from William B. Ogden, made in good faith from the 31st of March, 1856, and payment of all taxes thereon, and claimed the benefit of the statute, and insisted, if Edward A. Nicholl was dead, he died more than seven years prior to the commencement of the suit. The defendant also set up a defense under the act of 1835, by showing possession of the premises by actual residence thereon under a connected title deducible of record from the United

States for more than seven years prior to the commencement of the suit.

The cause was regularly at issue by answer and replication, and on the proofs, a decree passed in favor of Mrs. Nicholl that she have dower in the premises, and her damages to be assessed, and costs.

To reverse this decision, the defendant has appealed to this court.

The only questions of importance are: 1. Was Edward A. Nicholl, the husband, dead? and 2. If dead, at what time did he die?

There was no positive proof of the death of the husband.

The proof was, that he left the city of New York, where he then lived from the time of his marriage in 1818, in December, 1842, under unfavorable circumstances, and never returned, except once, when he staid with his wife about one week in the adjacent city of Brooklyn. He was last heard from by his family and friends through a letter from him dated Pittston, Pennsylvania, March 21, 1852; although search was made for him at that place, and at all places where it was supposed he might have gone, it was fruitless. Under these circumstances, that the law raises the presumption that he was dead at the end of seven years from that date is well settled. The general rule on this subject may be thus stated: When a person goes abroad, and has not been heard of for a long time, the presumption of the continuation of life ceases at the expiration of seven years from the period when he was last heard of. And the same rule holds, generally, with respect to persons away from their usual places of resort, and of whom no account can be given: *Best on Presumptions*, 190.

The appellee's counsel insist that the husband was to be presumed to be alive until March 21, 1859, and only after that date should he be presumed to be dead; while the appellant's counsel insists there was no presumption that he lived until the last day of the seven years, and appellee must show at what time he died in order to overcome the presumption of law in favor of a party in possession of land resisting a hostile claim.

The appellee's case rests entirely upon the theory that the presumption of Nicholl being alive lasted for seven years from the date of his last letter, or until March 21, 1859, when it ceased, being followed by the presumption of his death from the last-mentioned date; and as this suit was commenced

March 14, 1866, the claim for dower was not barred by the limitation of seven years from the death of the husband.

The rule as found in *Best*, 191, is the English rule established in the case of *Doe ex dem. Knight v. Nepean*, 5 Barn. & Adol. 86, and affirmed on appeal in the exchequer in *Nepean v. Doe ex dem. Knight*, 2 Mees. & W. 894, but has not been adopted in this country to the extent there laid down. Our courts have adopted the presumption of death after the lapse of seven years, leaving it incumbent on the party who claims a benefit or interest on his being alive within that time to prove it. At what particular time a party died is of no importance to one claiming a right which becomes established on a death, but it may be important to one resisting that right; and so it becomes an affirmative fact, which the party alleging must prove.

The common law, in accordance with the civil law, adopted the principle that the continuation of life should be presumed until the contrary was shown. The statutes of 1 Jac. I., c. 11, sec. 2, in relation to bigamy, and 19 Car. II., c. 6, in relation to leases determinable on lives, innovated upon this doctrine by the establishment of a rule, which was afterwards adapted by way of analogy, to cases not within the purview of these statutes. So that it has become to be regarded as a settled principle that the absence of a party for seven years without any intelligence being received of him within that time raises the presumption that he is dead, and the jury, on proof of such absence, have a right to presume his death. A less period will not suffice to raise the presumption; but a party whose interest it is to show he was living within that time is at liberty to show it by such facts and circumstances as will inspire that belief in the minds of the jury. As in this case, the demandant, to make out her right to bring her action, had only to show her husband had not been heard of from the 21st of March, 1852, to the 21st of March, 1859; the presumption of law then comes in that he was dead on the 22d of March, 1859, being seven years from the time he was last heard of. This is all the proof she was required to submit, the marriage being established, and no question being made as to the title of her husband. When she, by competent proof, raised this presumption of death, to what period of time did it extend? The answer is plain: her right to sue did not exist until the death of her husband was established; and as that was not established until the twenty-first day of March, 1859, the pre-

sumption took effect on that day; then, in legal contemplation, her husband was not among the living.

It was undoubtedly the right of appellant to rebut this presumption by showing from facts and circumstances that his death, in all probability, happened before that day, or on any day of any month or year between that day and the day on which he was last heard from. It was for her interest such proof should be supplied, and it was her duty to supply it: *Lloyd v. Deakin*, 4 Barn. & Ald. 433; S. C., 6 Eng. Com. L. 548; *George v. Jasson*, 6 East, 309. The fact of death is presumed from and after a particular day, and that fact makes out the demandant's right to sue as the widow for her dower. Those contesting this right must show in some way, or raise a presumption at least, that on the day after, she was not a widow, by raising a presumption that her husband died at a time intermediate these dates, or was then living. The demandant had done all the law required of her, by raising the presumption of the death of her husband before she brought her action. To overthrow this is a duty devolving on the defendant. It was not important to the demandant that she should establish the precise time of her husband's death; that was no part of her case, but it was the very gist of the demandant's case, and to support it she could have urged the facts and arguments now urged by her counsel, such as the age of the husband; his health and exposure to disease; his occupation; his state of mind as to hopefulness or despondency; his regard for his family and friends, as being warm or indifferent; in short, all the circumstances which surrounded him, to raise a probability that he died soon after the date of his last letter. These considerations are presented here by the appellant's counsel, and are, briefly, that he was surrounded by an affectionate family, to which he was warmly attached, at the time he left New York in 1842; that these affectionate relations continued after his departure, is shown by the correspondence kept up between him and his family, and with Demran, an intimate friend; that he and his wife met three times, apparently in a clandestine manner, after he left New York. And the learned counsel refers to the three last letters written by Nicholl as furnishing the probability that he died soon after March, 1852, rather than that he lived until March, 1859.

The reasons he gives in support of this view are, because no letters were received from him which were written after March

22, 1852, whereas he had frequently written to his wife and friends until that date since his departure from New York; because he has never been seen by any of his family or friends since that date, so far as the proof shows, while before that time he had three interviews with his wife, one in Ohio, one in Pennsylvania, and one in Brooklyn, then and ever since his wife's place of residence; because, when last heard from he was poor and needy, and had been so for a long time, and his wants had been in a measure supplied by small remittances of money from his wife and friends, and he knew that money and other aid were always at his disposal when required by him, and he never called for or received any further aid or money from his family; that in 1852 he was fifty-three years of age, and his letters show that his health, spirits, and strength were broken and failing, and the probabilities in such cases are much greater that the man will die presently—especially one who is self-exiled under consciousness of guilt—than that he will recover strength and live seven years longer; that the presumption of the continuance of his life for seven years after March, 1852, without intercourse or correspondence with his family is inconsistent with his previous habits in that respect, with his long-life affectionate regard for his family and friends, with his age, with his depressed bodily and mental condition, with his poverty and need of assistance, with the fact that immediate and thorough inquiry was made for him in the states to which he proposed going, without any tidings ever being received from him.

These considerations are properly suggested, perhaps, but they fall far short of raising the presumption desired by appellant. His last letter received seemed to indicate that he had resolved to earn his own support by hard labor, and by a life of honest industry wipe out the stigma that had attached to his name. He does not write as a victim of despair, but rather in a hopeful tone, with some blessings of life in anticipation. There is no proof, not the slightest, of any particular cause of death being in operation at the time he was last heard from, and none that he was exposed to any particular cause of death afterward. Remorse, perhaps, was doing its work by day and by night, the usual relief from which is self-destruction, yet it nowhere appears that such a suggestion or thought was ever entertained by him. It seems more probable that, feeling most keenly his shame and his dependence on those

he loved and had wronged, he formed the resolution they should hear of him no more,—that he would extricate himself from their embarrassing kindness, and have no further communication with them. Moralists have said there is no pang more keen to the sensitive mind than to be obliged to accept benefactions from those you have injured. Which is most probable, that he removed himself from all intercourse with his family under the pressure of such feelings, continuing to live on and pine on in solitude and in shame, rather than that he died soon after his last letter, unless by his own hand, of which there is no suspicion or suggestion, and he the victim of no dangerous disease, and exposed to no particular cause of death?

His case is not like any of those to which reference has been made; but one class of these cases is where the evidence shows a cause in existence at the time the person was last heard of, which would in seven years or less naturally and probably produce his death. Such person never after being heard of, it is reasonable to suppose this cause produced its natural result.

In the case of *Sheldon v. Ferris*, 45 Barb. 124, cited by appellant's counsel, the death of a party who had not been heard from for eight years was presumed to have occurred soon after the time of his disappearance, from the fact that he had frequently declared his intention to commit suicide. So in the case of *Webster v. Birchmore*, 13 Ves. 362, the party was in a desperate state of health, and was to have returned in six months. In the case of *Watson v. King*, 2 Eng. Com. L. 322, the supposed deceased was exposed to heavy gales at sea, in the spring of 1814, and the vessel was never again heard of, and the court approved the finding that the missing person died before the 8th of June of the same year. In *Offenheim v. Wolf*, 3 Sand. Ch. 517, the death of a person who had embarked on the steamship *President*, on the 11th of March, 1841, was presumed to have occurred before May in the same year, for the reason that no tidings had been received from that ship since she left port for England, and that as the usual time for steam-passages across the Atlantic from New York was fourteen or fifteen days, the reasonable presumption was, that she had foundered soon after leaving port, and all on board perished.

The case of *Sillick v. Booth*, 1 Younge & C. 117, S. C., 20 Eng. Ch. 119, was a case of shipwreck, the alleged deceased

being exposed in a vessel in the hurricane season, then, as now, prevailing among the West India Islands.

In all these cases, the probability of death at a particular time was so great as to amount almost to positive proof of the fact. This case is barren of any strong fact to raise any presumption sufficient to rebut that which the law raises,—that a man is dead who is not heard of in seven years. The appellant, in addition to the considerations suggested of a probability that Nicholl died soon after he was last heard from, brings up the fact that in 1858, or early in 1859, appellee made a demand of dower on William B. Ogden, which she signed with her own hand, and which was served on Ogden as the foundation of a suit against him for the recovery of dower.

That demand was dated Brooklyn, New York, January 18, 1859, and counsel insists it is evidence the demandant believed her husband dead in 1858, and she ought now to be estopped from denying it. It is apparent from the testimony this demand originated in mistake, and no proceedings were had under it. Had there been, the rule in 2 Greenl. Ev., sec. 278, cited by appellant, would apply and control. Her husband was not at that date, in contemplation of law, dead, nor was she then in a position to claim her dower.

We concede the appellant in this case is entitled to the full benefit of every presumption in her favor, but it is no less the right of the appellee. The claim of appellee rests wholly on a presumption, but it becomes as strong as proof from Holy Writ when un rebutted. To rebut it, we are not of opinion the appellant has produced any circumstance calculated to have that effect. Appellant being in possession, and protected by the act of 1839, if not by the act of 1835, is in no better position than any other person similarly situated, nor do we recognize any rule of law requiring the appellee to overcome every possible presumption which the law raises in favor of the appellant which she has not overcome. What was the appellee to prove to entitle her to recover? Seisin of the husband, marriage and death of the husband,—all of which was proved or admitted, against which no possible presumption could exist, unless the court should take away from the appellee the benefit of a presumption which the law awards to her. The law says her husband did not cease to be numbered among the living until the 21st of March, 1859; from and after that day he was not alive.

This court has repeatedly held that to maintain such a de-

fense as was set up by the appellant an adverse possession of seven years of the premises must be shown, and the burden of proof is on the defendant; and as her possession could not have been adverse until after the death of E. A. Nicholl, it follows the burden of proof was upon her to show when it happened, so that thereby the adverse possession could be established: *Woodward v. Blanchard*, 16 Ill. 424; *Higgins v. Crosby*, 40 Id. 260; *Steele v. Gellatly*, 41 Id. 39.

We have said the English rule laid down in *Knight v. Nepean*, 5 Barn. & Adol. 86, and in *Napean v. Knight*, 2 Mees. & W. 893, that the only presumption where a person has been absent for seven years without being heard of is that he is dead, but there is no presumption as to the time of his death; whether he died at the beginning or at the end of any particular period during those seven years, has not been generally adopted in this country. As held by the courts of this country, the doctrine is, that a person once found to be alive is presumed to continue to live until there be proof of the contrary. At the end of seven years from the time he was last heard of, the presumption of life ceases, and the opposite presumption of death takes its place. The legal presumption, as we understand from the decisions quoted by appellee, establishes not only the fact of death, but also the time at which the person shall first be accounted dead. This is an arbitrary presumption, but rendered necessary on grounds of public policy, in order that rights depending upon the life or death of persons long absent and unheard of may be settled by some certain rule: *Burr v. Sim*, 4 Whart. 150 [33 Am. Dec. 50]; *Bradley v. Bradley*, 4 Id. 173; *Whiteside's Appeal*, 23 Pa. St. 114; *Smith v. Knowlton*, 11 N. H. 191; *Newman v. Jenkins*, 10 Pick. 515; *Loring v. Steinman*, 1 Met. 211; *Eagle v. Emmett*, 4 Bradf. 111; *Clark v. Caulfield*, 15 N. J. Eq. 119.

The rule as stated in *Knight v. Nepean*, *supra*, and which is the authority in *Best*, 191, is not a bad rule, and might be recognized here without any detriment to the rights of these parties. Although there be no presumption of the time of the death, whether earlier or later during the seven years, yet if it be important to any one to establish the precise time of such person's death, he must do so by evidence of some sort, to be laid before the jury for that purpose, beyond the mere lapse of seven years since such person was last heard of. As we have already said, it was the right of appellant, she being

interested in the precise time of Nicholl's death, to have furnished the evidence thereof.

We are satisfied the presumption of death, established by appellee, was not weakened by anything proved on the part of the appellant, and that her right of action was complete before seven years expired, after the 21st of March, 1859. Seven years are allowed to furnish the presumption of death. That being established, the suit for dower must be brought within seven years thereafter, as held in *Owen v. Peacock*, 38 Ill. 33, and *Steele v. Gellatly*, 41 Id. 39. The appellee was within the rule of law, and the judgment must be affirmed.

Judgment affirmed.

PRESUMPTION OF DEATH OF ABSENT PERSON, from whom no tidings have been received, does not arise until the end of seven years. No presumption of death within that time can be raised unless the absent one be shown to have met with some specific peril before that time, and the mere fact that the person was a passenger upon a vessel, that neither he nor the vessel nor the crew had been heard of for sixteen months, and that the vessel and its master had been given up as lost, is not sufficient to raise that presumption: *Ashbury v. Sanders*, 68 Am. Dec. 300. Party must be treated as living where no evidence is introduced to show his death: *Peabody v. Hewitt*, 83 Id. 486. One's absence from particular place raises no presumption of his death, where there is no evidence that he ever established his residence there. To raise this presumption, a party's absence for seven years or more from his home or established residence must be proved, and that no intelligence of him has been received: *Stinchfield v. Emerson*, 83 Id. 524; see notes to above cases.

WRIGHT v. DUNNING.

[46 ILLINOIS, 271.]

FORMER ADJUDICATION — HOMESTEAD. — The heirs of a deceased husband commenced proceedings for partition, making his widow a party. She answered, claiming dower, which the court adjudged her, and as partition could not be made, the court decreed her an annual allowance in lieu of dower, and ordered the land sold subject to such payment. The widow made no claim of homestead, and it was held that she was estopped from doing so against the purchaser at the partition sale.

FORMER JUDGMENT. — As general rule, person having been made a party to a suit in a court having competent jurisdiction, and laboring under no disability, is bound by the determination of his rights, if fairly before the tribunal. When their rights are thus passed upon and determined, such parties are concluded from again litigating them in the same or another tribunal.

OBJECT OF MAKING PERSON PARTY TO LEGAL PROCEEDING is to enable him to be heard in the assertion of his rights, and failing to set them up, that he may be concluded from again litigating them.

HOMESTEAD—RES JUDICATA. — Where a widow not under any legal disability is sued in a matter involving her claim of homestead, and she fails to set it up or establish it, her homestead rights will be concluded by the decree therein, and she will not be allowed to afterwards assert it in another proceeding.

HOMESTEAD MAY BE ABANDONED BY WIDOW UNDER NO DISABILITY, after the death of her husband, in the same manner as he could have done.

HOMESTEAD. — Where person ceases to occupy premises as a home, or acquires another place of permanent abode, or where the place is abandoned with the intention to no longer occupy it as a home, the statutory homestead privileges are lost. But where the absence is occasioned by sickness or other necessary cause, is temporary, and with the intention to return, the case is different.

HOMESTEAD. — Person cannot have two homes at once, both exempt, nor can he have two, either of which, at his election, would be exempt.

THE opinion states the case.

George R. Joiner, for the appellant.

Roff and Doyle, for the appellee.

By Court, WALKER, J. This was a suit in chancery, brought by Achsah Dunning, as the widow of Eben Dunning, for the recovery and assignment of her homestead in certain lands owned by her husband in his lifetime, and upon which he resided at the time of his death. There is no contest as to the ownership of the land, or its occupancy by her husband as a home. And it is admitted that appellee is the widow of Eben Dunning; but it is denied that she had any homestead rights in the premises. The defense insist that appellee is barred from claiming this right by the decree of the circuit court, in which her dower was ascertained and found by the decree, and also by her having abandoned the premises as a homestead before the commencement of this suit.

It appears that the heirs of Eben Dunning filed a petition for partition of these premises, in the circuit court. Appellee was made a party to the proceedings, and the petition alleged that she was entitled to dower in the premises; that on the hearing the court found that she was entitled to dower, and appointed commissioners to assign it; and they having reported that it could not be assigned, the court thereupon decreed that she receive a yearly allowance of \$250, in lieu of her dower in the premises, payable annually during her natural life, and made it a charge upon the land. On the report that partition could not be made, the court below decreed the sale of the lands by the master, subject to the payment of the widow's

annuity. The lands were sold subject to this charge, and purchased by appellants.

It also appears that appellee, soon after the sale of the land, removed from the place. Nor does it appear that she ever claimed to have homestead rights in the premises before she left them. It appears that she was opposed to a division of the land, and insisted that it should be sold subject to the charge of her yearly allowance in lieu of dower; and, so far as this record discloses, she never, directly or indirectly, claimed any interest in the land beyond her dower until after the sale and her removal from the place. She repeatedly said that she did not desire or intend to live upon the place, but would leave it as soon as the land should be sold. After the sale was made, she removed to the village, and built a house in which to reside. So far as we can see, she then had no intention of returning to reside upon the farm.

As a general rule, a person having been made a party to a suit in a court having competent jurisdiction, and laboring under no disability, is bound by the determination of his rights, if fairly before the tribunal. When their rights are thus passed upon and determined, such parties are concluded from again litigating them in the same or another tribunal. In this case, it appears that appellee was duly brought into a court of competent jurisdiction for the purpose of having her rights in these lands ascertained and established, and that she failed to claim any right to a homestead, and apparently only claimed to have dower in the lands; and there is no pretense that she was under any disability at the time, and she did not then assert this claim. The proceeding was for a partition of the land, if it could be made; or if not, for its sale. She was bound to know that if partition was made, and she had a homestead, the right should be established, so as to enable it to be fairly and justly made. The very object of making a person a party to a legal proceeding is to enable such person to be heard in the assertion of his rights; and failing to set them up, that he may be concluded from again litigating them.

It may, however, be said that the right to hold the homestead forms an exception to the rule. It has been so held to the extent that where the husband and wife are made parties, and they are entitled to homestead rights, and they are not relied upon, the wife is not concluded or barred from

asserting the right; and inasmuch as she cannot sue alone for the right, that it may be asserted by the husband and wife, notwithstanding the decree or judgment. And this exception grows out of the statute conferring the right, which declares that the husband alone cannot release the right, but that he must be joined by the wife. If a husband and wife were to make a mortgage, and the wife were to relinquish her dower, but refuse to release her right of homestead, and when suit should be brought for a foreclosure, if that right should be cut off by the wife's failing to set it up, the husband, by refusing to insist upon it, or to enable the wife to do so, could in this mode release the homestead without the assent of the wife, and thus defeat the statute. This court, however, has not held, nor has it intended to hold, that an unmarried head of the family, capable of releasing the homestead, and occupying it, failing to assert the right, where a court is called on to pass upon the right, that he would not be concluded. This is the extent to which the exception has been carried. And when a person not under disability is sued, and the homestead is involved, it will be affected by any neglect to assert it, precisely as any other right. Appellee was not under disability, and should have set up and insisted upon the right when before the court in the partition suit; and failing to do so then, she should now be concluded from claiming the benefit.

Appellee, at no time previous to the sale and its confirmation, claimed anything but dower in the premises. She gave no notice to the purchasers of her claim, but permitted them to purchase under the belief that the place was only subject to the annual sum decreed her in lieu of dower. If under the circumstances she may also claim homestead rights, it would work a great hardship upon the purchasers. They were no doubt governed in the price paid for the land in supposing it was not subject to any other burden than the annuity which was specified by the master when he made the sale.

After the death of the husband, the widow, being under no disability, may abandon the homestead precisely as could the husband. Whenever it appears that it has ceased to be her home, and that she has acquired another place of permanent abode, she thereby loses all right to claim the statutory privilege, or even if she abandons it with the intention of not returning to it again as her home, the right would be lost. But if from sickness or other necessary cause she were to

leave temporarily, with the intention of again returning, it would be otherwise. The proof in this case, we think, establishes the fact that appellee had abandoned these premises as her home before this suit was brought. This is clearly inferable from her acts and declarations in reference to the occupancy of the premises. It is clearly established that she intended to reside in the village, and had built a house for the purpose. She had said that she did not intend to reside on the farm. We can therefore see no well-founded right on her part to claim and recover a homestead in these premises. We, however, do see that she, while occupying her house in the village, could claim it under the homestead act. By our act, a person could not have two homes at the same time, both exempt, nor could he have two, either of which, at his election, would be exempt. The home must be such that it, and it alone, is within the protection of the statute. The decree of the court below is reversed, and the cause remanded.

Decree reversed.

JUDGMENT OF COURT OF GENERAL JURISDICTION upon subject-matter within its jurisdiction is final and conclusive, and can never be questioned in a collateral suit: *Young v. Rathbone*, 84 Am. Dec. 151. Decree of court having jurisdiction of parties and subject-matter is valid and binding on all the parties, and cannot be attacked collaterally: *Wimberly v. Hurst*, 83 Id. 295. Court having jurisdiction to decide a question, its judgment is conclusive upon all the questions determined therein: *Grasmeyer v. Beeson*, 70 Id. 309. Judgment of competent tribunal is conclusive upon matters actually determined, and also upon matters which the parties might have litigated in the case: *Ellis v. Clarke*, 70 Id. 603. See the cases in the notes to all the above.

HOMESTEAD.—Under Illinois statute, wife can lose her homestead only by a release executed by her in the mode provided, or by removing from and abandoning the premises as a home: *Hoskins v. Litchfield*, 83 Am. Dec. 215; *Pardee v. Lindley*, 83 Id. 219.

ACTUAL RESIDENCE IS REQUIRED TO PROTECT HOMESTEAD FROM SALE UNDER EXECUTION, as a general rule, although it is not essential under all circumstances. If the husband removes with his family to another state, and remains away two years, this is strong evidence of abandonment: *Cabeen v. Mulligan*, 87 Am. Dec. 347. Actual removal from homestead with no intention of returning is a waiver or forfeiture of the right, amounting to an abandonment as against purchasers or creditors, even though no new homestead be gained: *Fyffe v. Beers*, 85 Id. 577. But the homestead will be treated as still existing if the removal was only temporary, and the *animus revertendi* is established: *Id.* Actual residence upon premises claimed as a homestead is necessary: *Tillotson v. Millard*, 82 Id. 112. Wife who leaves homestead with her husband, and occupies a new one which he has provided for her, cannot claim homestead rights in the abandoned premises: *Allison v. Shilling*, 86 Id.

622. In the cases cited in the note to above case, the law of homesteads is much elaborated upon.

THE PRINCIPAL CASE IS CITED to the point that a wife after the death of her husband may, if she is under no disability, abandon a homestead precisely as her husband could have done, in *Buck v. Conlogue*, 49 Ill. 395; *Shepard v. Brewer*, 65 Id. 383, 386; *Kingman v. Higgins*, 100 Id. 326. It is cited in *Vasey v. Board of Trustees etc.*, 59 Id. 188, to the point that the selection of a new residence, and suffering the old one to go into decay, amounted to an abandonment of the homestead right therein.

CASES

IN THE

SUPREME COURT

OF

INDIANA.

MAKEPEACE *v.* LUKENS.

[27 INDIANA, 435.]

SERVICE BEFORE FILING. — Notice of the hearing of a proposed motion may be served before the papers upon which the motion is based have been filed in court.

AMENDMENTS. — Authority to amend a record after the proceedings have ceased to be *in fieri*, and the term is past in which the record was made, is founded upon the acts of Parliament on the subject of amendments, which are declared by statute to be in force in this state.

AMENDMENTS NUNC PRO TUNC are only allowed where the case is within a statute, or where there is something to amend by; that is, where there is some memorial paper, or other minute of the transactions in the case, from which what actually took place in the prior proceedings can be clearly ascertained and known.

AMENDMENTS NUNC PRO TUNC HAVE ONLY BEEN ALLOWED where a subsequent paper, pleading, order, or proceeding in the progress of a case has been corrected by something in the record or proceedings of prior, or at least equal, date with the matter in which the error is sought to be amended.

AMENDMENT INSERTING ORDER OF SALE IN RECORD NOT ALLOWED. — In proceeding by guardian to sell real estate of ward, the record showed a petition for the sale, the bond, appointment of appraisers, their report, the guardian's report of the sale, in which he reported that he made the sale in pursuance of a certain order of the court, and the confirmation of the sale by the court. Upon motion to enter *nunc pro tunc* a formal order of sale, *held*, that there being nothing preceding the order of sale which it is sought to have entered that implies that such an order was made, the amendment will not be allowed.

THE opinion states the case.

W. March and R. Lake, for the appellants.

J. Davis, for the appellee.

By Court, RAY, J. At the January term, 1859, of the court of common pleas of Madison County, Horace B. Makepeace, as the guardian of Cassandra Makepeace, filed his petition for the sale of certain land belonging to his ward, at private sale. The record of the proceedings shows the appointment of appraisers, and their report, appraising the land at two thousand four hundred dollars. Then follows a report of the sale, which recites that, pursuant to an order of the court made at that term, the said guardian did, on the seventh day of January, 1859, sell to the appellee the property described for two thousand five hundred dollars, cash in hand, and he asks that the sale be confirmed and a deed ordered. The entry from the order-book recites the appointment of Horace B. Makepeace as guardian of the said Cassandra, the filing of his bond as guardian in the penal sum of five thousand dollars, the application for the sale, the appointment of appraisers, their report, and the guardian's report of the sale; and the record proceeds as follows: "And the court having seen and inspected the same, and being well advised, now confirms the sale so made, and orders and directs said guardian to execute a conveyance to said purchaser for the premises so sold as aforesaid."

The proceedings in the case now before us were had upon a motion for an entry *nunc pro tunc* of a formal order directing the sale of the property. It is objected that a notice of the motion was served upon the appellants before any complaint was filed in court. The notice was sufficient. It was, that on the second day of the term the appellee would move the court to correct the record, stating the motion in full. At the time named, affidavits were filed and the motion made. The notice is to bring the party into court at the time of the motion, and there is no statute requiring the papers upon which the motion is based to be filed any special time preceding the date named for making the motion.

Upon the trial, the record which it was sought to amend was introduced in evidence, and over the objection of the appellants, a witness was permitted to state that the statement contained in the report of the sale, viz., that the same had been made pursuant to the order of the court was true, and the court thereupon ordered the amendment to be made. From this order an appeal is taken. The question presented is, whether the evidence before the court authorized the *nunc pro tunc* entry of the order for the sale of the land.

It was ruled by this court in the case of *Jenkins v. Long*, 23 Ind. 460, that the authority to amend the record after the proceedings have ceased to be *in fieri* is founded upon the acts of Parliament on the subject of amendments, which are declared by statute to be in force in this state. To those acts we must look in order to determine what evidence will be sufficient to authorize the amendment. At common law, it was held that the judges could not alter the proceedings after they had become a record, except during the same term of which the record was. The reason for this was, that during the whole term in which any judicial act is done, the record remains in the breast of the judges of the court, and therefore the roll is alterable during the term as they shall direct. But when the term is past the roll is the record, and admits of no alteration: Co. Lit. 260. Subsequently it was permitted to amend, notwithstanding the record was made up and the term was past, considering the proceedings to be *in fieri* till judgment was given, but after judgment was entered, no amendment could be made at a subsequent term: 3 Bla. Com., c. 25, sec. 4. To relieve from the rigor of this rule, it was enacted in the reign of Edward III., "that by the misprision of a clerk in any place, wheresoever it be, no process shall be annulled or discontinued by mistaking in writing one syllable or letter too much or too little; but as soon as the mistake is perceived, by challenge of the party, or in other manner, it shall be amended in due form, without giving advantage to the party that challengeth the same, because of such misprision": 14 Edw. III., st. 1, c. 6. It being held by the courts that this statute related only to proceedings before judgment, and there being much question as to the extent proper to carry it, the act of 9 Edw. V., st. 1, c. 4, after reciting the former statute, declared that "the king, considering the diversity of opinions which had been upon the said statute, and to put the thing in more open knowledge, had ordained by authority of Parliament that the justices before whom such plea or record is made, or shall be depending, as well by adjournment as by way of error, or otherwise, shall have power and authority to amend such record and process, as afore is said, according to the form of the same statute, as well after judgment in any such plea, record, or process given as before judgment, as long as the same record and process is before them, in the same manner as the justices had power to amend such record and process before judgment given by

force of the said statute Edward III." This statute, afterwards made perpetual, confined the amendment to a syllable or letter, but permitted it to be made after judgment.

By 8 Hen. VI., c. 12, it was enacted "that the king's judges of the courts and places in which any record, process, word, pleas, warrant of attorney, writ, panel, or return, which for the time shall be, shall have power to examine such records, processes, words, pleas, warrants of attorney, writs, panels, or returns by them and their clerks, and to reform and amend (in affirmance of the judgments of such records and processes) all that which to them in their discretion seemeth to be misprision of the clerks therein, except appeals, indictments of treason, and of felonies and outlawries, so that by such misprision of the clerk no judgment shall be reversed or annulled. And if any record, process, writ, warrant of attorney, return, or panel be certified defective, otherwise than according to the writing which thereof remaineth in the treasury, courts, or places from whence they are certified, the parties in affirmance of the judgments of such record and process shall have advantage to allege that the same writing is variant from the said certificate; and that found and certified, the same variance shall be by the said judges reformed and amended according to the first writing."

Under the authority of these statutes alone can amendments be made of the record when the proceedings are no longer *in fieri*, and the term is passed in which the record was made.

It will be observed that by these statutes the judges "have power to examine the records, processes, words, pleas, warrants of attorney, writs, panels, or returns, by them and their clerks, and to reform and amend all that which to them, in their discretion, seemeth to be misprision of the clerks therein." It has accordingly been held that such amendment of the record cannot be made unless there be something to amend by. Thus the original writ or bill is amendable by the instructions given to the officer; the declaration by the bill; the pleadings subsequent to the declaration by the paper-book, or the draft under counsel's hand; the *nisi prius* roll by the plea roll; the verdict by the plea roll, memory or notes of the judge, or notes of the associate or clerk of assize; and if special, by the notes of counsel, or even by an affidavit of what was proved upon the trial; the judgment by the verdict; and the writ of execution by the judgment, or by the award of it on the roll, or by former process: 1 Tidd's Practice, 713.

In *Wynne v. Thomas*, Willes, 563, the lord chief justice stated the law thus: "The true rule is, that original writs may be amended by 8 Hen. VI., c. 12, where it is only the misprision and negligence of the clerk, but a mistake occasioned by the nescience or ignorance of the clerk is not amenable by that statute, nor any other mistake, where there is nothing to amend it by."

In Bac. Abr., tit. Amendment, F, it is said: "In affirmance of the judgment, the judgment itself may be set right and amended by another part of the record, in a fact which appears to be the misprision or neglect of the clerk, as in the mistake of the names of the parties." And again: "But if there be a mistake or error in the judgment in any such matter in which the clerk has no such instructions, as if, before the 16 & 17 Car. II., c. 8, a *capitur* were entered for a *misericordia*, or *e converso*, this was error in the judgment, because before the statute it made a fine to the king and a difference in the execution, and there being no instructions in the record itself, or in the judgment-book, whereby to amend it, it did not appear whether it was the error of the clerk in the entering, or of the court in giving the judgment, and therefore could not be amended: *Chiverton v. Trudgeon*, Palm. 98; *Harecourt v. Bishop*, Cro. Eliz. 497; *Chettle v. Lees*, Carth. 167.

In *King v. King*, 7 Mod. 250, it is said: "There are two rules by which we are to be governed: the one is, that no amendment in original writs can be made unless it be the misprision of the clerk; the other, that nothing can be amended unless there is something to do it by": *Ray v. Lister*, Andrew, 351.

The case of *Ellis v. Ewbanks*, 3 Scam. 190, was where the error assigned arose out of the fact that the summons was dated "eighteen hundred and thirty." The record showed that the proceedings were commenced in 1839. The defendant in error moved to amend the record by adding the word, or syllable, "nine" to the word "thirty," alleging that it was omitted by the clerk through inadvertence. Wilson, chief justice, said: "The motion in this case must be overruled. Though it is probable that the clerk of the circuit court, by mistake, omitted the word 'nine' after the words 'eighteen hundred and thirty,' yet there is nothing appearing upon the record which can be regarded as evidence that such is the fact, so as to authorize this court to interfere."

Justice Story, in *Albers v. Whitney*, 1 Story C. C. 310, states the practice of the English courts under the statutes of amend-

ments thus: "Judgments and records are there never allowed to be amended, except, in the first place, where the case is within the reach of some statute, or, in the next place, where there is something to amend by, that is, where there is some memorial paper, or other minute of the transactions in the case, from which what actually took place in the prior proceedings can be clearly ascertained and known."

In every case cited by Mr. Tidd, in his Practice, where amendments have been permitted under the English statutes, a subsequent paper, pleading, order, or proceeding in the progress of the case has been corrected by something in the record or proceedings of prior, or at least equal, date, with the matter in which the error is sought to be amended. Thus the original writ or bill may be amended by the written instructions given to the officer: *Tomkin v. Croker*, 1 Ld. Raym. 564; the declaration by the bill: *Russell v. Martin*, 1 Strange, 583; the judgment by the verdict: *Rees v. Morgan*, 3 Term Rep. 349; *Flindell v. Fairman*, 11 Price, 410; *Richardson v. Mellish*, 3 Bing. 346; and such would seem to be the proper practice. A cause proceeds according to fixed and formal rules; each successive step grows from and rests upon some precedent action, and should properly be tested by that which constitutes its immediate support. In the case before us, there is nothing preceding the order of sale which it is sought to have entered that implies that such an order was made. The petition for the sale and the appointment of the appraisers are steps required to be taken before such an order can be made. But they are not all the steps which the statute directs before the order of sale is made. Section 18 of the "act touching the relation of guardian and ward" (2 Gavin and Hord, 571) provides that after the appraisement of the real estate has been made, the court shall require the guardian to execute a bond for the faithful discharge of his duties, and the payment of all moneys arising from such sale, according to law. Now, no such bond was required from the guardian, and if an order of sale was made by the court it was irregular. We find nothing in the record authorizing us to determine that the court was chargeable with such irregularity. We think, therefore, that the amendment should have been refused.

We have not considered the statutes of jeofails, which authorize the courts to disregard certain imperfections, omissions, or defects in the record, for these statutes go to the question of the necessity of the amendment, a matter which is not pre-

sented by this record. We are not called upon to determine whether a sale ordered by the court, under a petition and after appraisal of the real estate, would be void for the failure to require a new bond of the guardian. Nor do we pass upon the question whether the confirmation of the sale, where the original order to sell has been omitted, renders the sale valid. We do not think that in the case before us the amendment of the record made by the court below was proper.

The judgment is reversed, with costs.

AMENDMENTS NUNC PRO TUNC are only allowed where there is some record from which to make the amendment; there must be something to amend by: *Summersett v. Summersett's Adm'r*, 91 Am. Dec. 494.

THE PRINCIPAL CASE HAS BEEN CITED and followed upon the subject of amendments in a large number of the succeeding Indiana decisions, as follows: *Hamilton v. Burch*, 28 Ind. 236; *Uland v. Carter*, 34 Id. 347; *Hunter v. Burnsville Turnpike Co.*, 56 Id. 223; *Bales v. Brown*, 57 Id. 282; *Miller v. Royce*, 60 Id. 192; *Schoonover v. Reed*, 65 Id. 315; *Reily v. Burton*, 71 Id. 126; *Smith v. State*, 71 Id. 254; *Seig v. Long*, 72 Id. 19; *Hannah v. Dorrall*, 73 Id. 469; *Mitchell v. Lincoln*, 78 Id. 533; *Chissom v. Barbour*, 100 Id. 4.

PITTSBURGH, FORT WAYNE, AND CHICAGO RAILWAY COMPANY v. VINING'S ADMINISTRATOR.

[27 INDIANA, 512.]

NEGLECTANCE. — IN ACTION FOR INJURY TO CHILD, COMPLAINT NEED NOT AVER that the child was not guilty of negligence; it is sufficient if it is averred that the injury was inflicted without the negligence of the parents, with whom the child resided.

WHERE CHILD IS INJURED, IF NEGLIGENCE OF ITS PARENTS or those having custody of it contributes to such injury, unless the same is willful, no action will lie therefor.

INJURY TO CHILD. — Unnecessary exposure to known danger of a child incapable of exercising the care and judgment of mature years is in itself an act of negligence on the part of the parent sufficient to defeat a recovery, unless the injury be willful.

INJURY TO CHILD, WHO MAY SUE FOR. — Under the statute, an action for the death of a child must be brought by its father, or in case of his death or desertion of his family, by its mother, or by the guardian for his ward. Where there is no father, mother, or guardian, the administrator may bring the action.

WORD "CHILD" USED IN STATUTE is not equivalent to the word "minor," but is limited to such as occupy the position of child to a parent, and are dependent upon the parent for support, etc. It does not include a minor who is the head of a family.

THE opinion states the case.

Brackenridge, Hendricks, Hord, and Hendricks, for the appellant.

Worden, Morris, and Fay, for the appellee.

By Court, RAY, J. The appellee filed his complaint as follows, in the Allen circuit court: "The plaintiff, as administrator of Alexander Vining, deceased, complains of said defendant, and says that on the third day of July, 1863, the said Alexander Vining, then being an infant of seven years of age, and without the fault or neglect of his parents, with whom he then resided, was casually upon the railway track of the defendant at a public crossing or highway over said track in Allen County, Indiana; that said defendant was then running a locomotive and train of cars over and along said track, and the plaintiff avers that while said Alexander was upon said track, at said public crossing as aforesaid, he could be distinguished by the agents and servants of said defendant then running said locomotive and train for a distance of more than half a mile from said crossing, within which distance said locomotive and train could have been stopped; yet the defendant wrongfully, negligently, and carelessly, without giving any warning, or in any way attempting to stop said train, and while said child might have been and was seen by the defendant's servants then running said locomotive and train, ran the said locomotive and train against and over the said child, and thereby so injured and maimed said child that it died thereof," etc.

The appellant demurred to the complaint, on the grounds,—

1. That it did not state facts sufficient to constitute a cause of action; 2. That the plaintiff had not the legal capacity to sue as administrator of an infant; and 3. That there was a defect of parties plaintiff in this, that the right of action was in Vining, the father of the infant, and not in the administrator. It is objected that the complaint does not aver that the child was not guilty of negligence. It does aver that he was on the track without the fault or negligence of his parents, with whom he resided. If a child of that tender age were wrongfully upon the track so as to fasten the charge of negligence upon either the child or the parents, while as a question of fact the neglect would be that of the parents, the law would impute it to the child. Where an infant of tender years is unnecessarily exposed to danger which it has not the judgment to avoid, the neglect must in fact be the omission of the

person having the child in custody in thus exposing it. We think, therefore, that the allegation being matter of fact, and not of law, it was proper that the averment should be made as to the custodians of the child rather than as to the infant itself. This position seems to us to be fully sustained by the authorities.

In the case of *Holly v. Boston Gaslight Co.*, 8 Gray, 123 [69 Am. Dec. 233], an action was brought by an infant of nine years of age by her father and next friend, for personal injury occasioned to her by the escape of gas while she was of right in her father's dwelling-house. Upon the question of negligence, this language occurs in the opinion of the court: "Nor does it make any difference that the plaintiff is a minor. She was under the care of her father, who had the custody of her person, and was responsible for her safety. It was his duty to watch over her, guard her from danger, and provide for her welfare, and it was hers to submit to his government and control. She was entitled to the benefit of his superintendence and protection, and was consequently subject to any disadvantages resulting from the exercise of that parental authority which it was both his right and duty to exert. Any want of ordinary care, therefore, on his part is attributable to her in the same degree as if she were acting wholly for herself." The same ruling was made in *Wright v. Malden and Melrose R. R. Co.*, 4 Allen, 283.

The rule that the plaintiff is not required to show any higher degree of care on his part than could reasonably be expected from such a person, announced in *Lynch v. Nurdin*, 1 Q. B. 29, and which was questioned in *Lygo v. Newbold*, 9 Ex. 302, does not seem to be followed in the later cases in England: *Waite v. North Eastern R'y Co.*, El. B. & E. 720; S. C., 96 Eng. Com. L. 719; *Singleton v. Eastern Counties R'y Co.*, 7 Com. B., N. S., 287; S. C., 97 Eng. Com. L. 287. In the case of *Hughes v. Macfie*, 2 Hurl. & C. 744, it appeared that there was a public street in Liverpool, over the whole of which, from fence to fence, the public had the right of way, subject to the existence of certain cellars. On one side of the street was a footpath, on the other side no footpath, but the cellars alluded to, which made that side less commodious as a way. Still the public had the right to pass there. The defendant, who was the occupant of a house and cellar on this latter side, took off the flop, or cover, of his cellar and placed it against the wall on the same side, nearly upright, so that it

could easily be pulled over. Hughes, the plaintiff, a child of five years of age, by playing on it and jumping from it, pulled it over on him and was hurt severely. The court say: "Had he been an adult, it is clear he could have maintained no action. He would have voluntarily meddled, for no lawful purpose, with that which, if left alone, could not have hurt him. He would therefore, at all events, have contributed by his own negligence to his damage. We think the fact of the plaintiff being of tender years makes no difference." In the late case of *Mangan v. Atterton*, L. R. 1 Ex. 239, where the defendant exposed in a public place for sale, unfenced and without superintendence, a machine which might be set in motion by any passer-by, and which was dangerous when in motion, the plaintiff, a boy four years old, by the direction of his brother, seven years old, placed his fingers within the machine, while another boy was turning the handle which moved it, and his fingers were crushed. It was held that the plaintiff could not maintain any action for the injury. Bramwell, B., said: "The defendant is no more liable than if he had exposed goods colored with a poisonous paint, and the child had sucked them. It may seem a harsh way of putting it, but suppose this machine had been of a very delicate construction, and had been injured by the child's fingers, would not the child, in spite of his tender years, have been liable to an action as a tort-feasor?"

The doctrine of *Lynch v. Nurdin*, *supra*, has been followed to some extent, however, by the courts of Connecticut, Vermont, and Pennsylvania. In New York, however, the same rule is recognized as in Massachusetts. In *Hartfield v. Roper*, 21 Wend. 615 [34 Am. Dec. 273], it was held "that although the child, by reason of his tender age, be incapable of using that ordinary care which is required of a discreet and prudent person, the want of such care on the part of the parents and guardians of the child furnishes the same answer to an action by the child as would its omission on the part of the plaintiff in an action by an adult." It seems to us that the unnecessary exposure to known danger of a child incapable of exercising the care and judgment of mature years, is in itself an act of negligence on the part of the parent sufficient to defeat a recovery, unless the injury be willful. The demurrer assigning for cause the insufficiency of the fact stated in the complaint was, we think, properly overruled, the complaint expressly denying such neglect.

The next question is as to the right of action,—whether it is given by statute to the parent or to the administrator. This question was decided by this court in the case of *Ohio etc. R. R. Co. v. Tindall*, 13 Ind. 366, where it was held that section 27, 2 Gavin and Hord, p. 56, confined the right of action to the parent where the injury occurred to a minor, and that section 784 Id., p. 330, authorized the action by the administrator in case of an adult. As in this case, the right of action did not exist at common law, but is of special statutory origin, and as the purpose of the statute can be accomplished by the construction adopted, we are not disposed to hold that in case of the death of an infant one right of action may exist in the parent and another in the administrator. The danger that in both actions the recovery would be in point of fact, for the same damage, is sufficient to deter the court from placing such a construction upon the statute, unless the intent of the legislature to confer such a right more clearly appeared. The demurrer for this cause should have been sustained. As this ruling results in a reversal of the case, we deem it better not to anticipate the action of any subsequent jury in a suit properly brought by an examination of the sufficiency of the evidence introduced on the trial below.

The judgment is reversed, with costs.

On a petition for a rehearing:—

RAY, J. Upon the filing of a petition for a rehearing in this case, we have for the first time been favored with an argument by the appellee. After a careful reconsideration of the questions ruled, we adhere to the conclusions heretofore announced. We have thought it proper, however, in view of the full discussion with which the present application has been accompanied, to state somewhat more in detail the reasons which have controlled us in the decision of one of the questions passed upon. Sections 27 and 784 of the code are directed to one common object, that is, to provide a statutory action for injuries or death resulting to one from the wrongful act or omission of another. The two sections must therefore be construed together, and, as far as possible, effect must be given to the provisions of each. A special regulation for a certain class of cases will take that class out of the general terms used in either section. With this qualification, the general provisions of the two sections must be regarded as applicable to cases coming within the language of either section: *Wil-*

liams v. Pritchard, 4 Term Rep. 2. The principle which controlled the decision of the court in *Blain v. Bailey*, 25 Ind. 165, applies still more clearly to this case. Thus section 27 provides by whom an action for such wrongful act or omission shall be instituted, but the provisions of that section are in terms limited to a case where the result of such act or omission is the injury or death of a child. So far, then, it is exclusive of the provisions of section 784, for that section is general in its terms, and its provisions on the subject of the person who shall bring the action cannot, therefore, be applied to a class of cases where special legislation has been had, in conflict with the more general language of the latter section. The provision that the personal representatives may maintain an action if the deceased could have maintained one, if the injury had not caused death, has been heretofore ruled to be applicable to the cause of action, and not to the person bringing it. In other words, an action may be sustained where the deceased, had he lived, would not have been prevented from recovering by reason of his own want of care: *Jeffersonville R. Co. v. Swayne*, 26 Ind. 477. There are, however, general provisions which apply to cases coming within the terms of either section. Thus where the wrongful act or omission causes death, whether the deceased was a child or of full age, the action must be commenced within two years, the recovery cannot exceed five thousand dollars, and it must inure to the exclusive benefit of the widow and children, if any, or next of kin, to be distributed in the same manner as personal property of the deceased.

So, also, although by the provisions of section 27 the action for the death of a child must be brought by the father, or in case of his death, or desertion of his family, or imprisonment, by the mother, or by the guardian for his ward, it seems clear to us that where there was neither father, mother, nor guardian, the case, not being specially provided for, would then come within the provisions of section 784, and the administrator would be the proper person to sue.

The word "child," as employed in section 27, is not to be construed as equivalent to the word "minor," but we think is limited in its application to one who occupies the position of a child to a parent, as depending upon him for protection, support, and education, and cannot be held to include one who, although a minor, has assumed the relation and responsibility devolving upon the head of a family. Webster says

the word "is applied to infants from their birth, but that the time when they cease ordinarily to be so called is not defined by custom." We think it is intended by the statute that the position occupied by the person should determine the question, rather the age alone.

In the case under consideration, it appears by the complaint that the action should have been prosecuted by the father, as father, and not as administrator.

In overruling the petition for a rehearing, we regard it as proper to state that upon the original consideration of the case a majority of the court were of opinion that the judgment should be reversed upon the additional ground that the finding was not sustained by the evidence. In deference to a doubt then expressed by one of the judges, the reversal was placed in the opinion upon the sole ground on which we stood together. A fuller consideration has satisfied us all that the child for whose death the action was brought was unnecessarily exposed by his parents to the danger which caused his death, and against which his judgment was too immature to afford him protection. Under such circumstances, to sustain the action, the evidence must have shown such recklessness on the part of the appellant as would imply a willingness to inflict the injury. This the proof did not establish.

The petition is overruled.

INJURY TO CHILD — NEGLIGENCE OF CHILD OR ITS PARENTS AS AFFECTING ACTION THEREFOR: See *Philadelphia etc. R. R. Co. v. Spearen*, 86 Am. Dec. 544; *Smith v. O'Connor*, 86 Id. 582; and the numerous cases cited in the notes to these cases.

ACTIONS FOR PHYSICAL INJURIES TO CHILD, WHO MAY MAINTAIN: See *Long v. Morrison*, 77 Am. Dec. 72, and numerous cases cited in note.

THE PRINCIPAL CASE IS CITED to the point that the unnecessary exposure to known danger of a child incapable of exercising the care and judgment of mature years is in itself an act of negligence on the part of the parent sufficient to defeat a recovery, unless the injury be willful, in *Lafayette etc. R. R. Co. v. Huffman*, 28 Ind. 287; *Jefferson etc. R. R. Co. v. Bowen*, 40 Id. 545-552; *Hathaway v. Toledo etc. R. R. Co.*, 46 Id. 25-30; *Higgins v. Jefferson etc. R. R. Co.*, 52 Id. 110; *Evansville etc. R. R. Co. v. Wolf*, 59 Id. 92.

JEFFERSONVILLE RAILROAD COMPANY v. ROGERS.

[25 INDIANA, 1.]

RAILROAD COMPANY MAY DISCRIMINATE IN ITS RATES OF FARE in favor of persons who purchase tickets before entering the cars.

REGULATION MAKING DISCRIMINATION IN PASSENGER FARES in favor of persons purchasing tickets before entering the cars imposes upon the railroad company the obligation to afford passengers the opportunity to avail themselves of the discrimination; and if this opportunity is not offered, the regulation is not binding, and a passenger who after tendering the regular ticket rate to the conductor is expelled from the train may recover from the company.

PASSENGER WHO REFUSES TO PAY FARE MAY BE EXPELLED BETWEEN STATIONS where the charter of the railroad company is silent upon the subject, and there is no general statute requiring the expulsion to be made at a station.

MEASURE OF DAMAGES WHERE PASSENGER WHO HAD NO OPPORTUNITY TO PURCHASE TICKET is expelled from the cars upon his refusal to pay a higher rate of fare is not confined to the difference between the two rates of fare, but extends to the consequences of the expulsion, which was purely wrongful.

RULE AS TO ALLOWANCE OF EXEMPLARY DAMAGES APPLIES EQUALLY IN SUIT AGAINST CORPORATION as in a suit against a natural person.

RATES OF FARE OF RAILROAD COMPANY NEED NOT BE FIXED by board of directors, and appear on the record of their proceedings. Agents other than the directors may be empowered to regulate such matters.

ACTION for damages. The opinion states the case.

T. A. Hendricks, O. B. Hord, and A. W. Hendricks, for the appellant.

F. T. Hord, W. Herod, W. W. Herod, R. Hill, and J. M. Rogers, for the appellee.

By Court, **FRAZER, J.** This was a suit by the appellee against the appellant for unlawfully expelling the appellee from its cars. The complaint alleged that the defendant's ticket agent refused to sell a ticket to the plaintiff; that he thereupon seated himself in the car without such ticket for the purpose of being carried from Indianapolis to Columbus, and tendered the usual ticket fare to the conductor, who refused that sum, and demanded a greater sum by fifteen cents; and upon a refusal by the plaintiff to pay the sum demanded, he was by the defendant expelled from the vehicle three miles from a station.

The answer was in two paragraphs. The first was a general denial, under which the matter pleaded in the second was admissible in evidence, and there was therefore no available error in sustaining a demurrer to the latter.

Various questions are made upon the instructions to the jury, and as to the admissibility of evidence, all of which are in the record by an unsuccessful motion for a new trial, there having been a verdict for the plaintiff in the sum of \$345.

The evidence established the averments of the complaint upon every point save that the plaintiff had applied for and been refused a ticket. Upon that subject there was a conflict. It appeared, too, that the appellant discriminated in its charges for passage in favor of persons holding tickets; the usual rate, if paid on the train, being \$2.10, and the usual rate for a ticket \$1.95. That the ticket agent was at the time supplied with tickets, and instructed to sell them, was clearly proven. Tickets were sold to other persons at that time, and for Columbus. If, therefore, he refused a ticket to the appellee, it was of his own motion, and in violation of his duties as agent of the appellant. The appellant existed under a special charter (Local Laws of 1846, p. 153), which gave it full power to fix its rates of passenger fares, "provided that the rates established from time to time shall be posted up at some conspicuous place or places on said road"; and this had been done as to the rates then usual, both for tickets and when payment was made on board to the conductor.

It is not controverted that the appellant had the right, for its own protection against the possible dishonesty of conductors, and for the convenient transaction of its business, to discriminate in favor of persons purchasing tickets. The regulation is a reasonable one, if carried out by the corporation in good faith. It tends to protect the corporation from the frauds of its conductors, and from the inconvenience of collecting fares upon its trains in motion; and it imposes no hardship whatever upon travelers. But if the corporation may refuse to furnish the tickets, and thus fail to do what is plainly implied by the adoption and publication of the rule, it would be unreasonable and therefore not binding upon its passengers. Such a corporation cannot be sustained, in so far as it assumes to be the arbitrary master of its patrons. It is a common carrier of passengers, and must perform the obligations which the law imposes upon it as such. It has no lawful authority to impose upon travelers by vexatious and deceptive rules and regulations, such as the one under consideration would obviously be, if it does not carry with it an obligation on the part of the corporation to afford passengers the opportunity to avail themselves of the discrimination in fares which it pub-

licly offers. That such an obligation does arise out of the adoption of such a regulation, was expressly ruled in Illinois: *Chicago etc. R. R. Co. v. Parks*, 18 Ill. 460 [68 Am. Dec. 562]; *St. Louis etc. R. R. Co. v. Dalby*, 19 Id. 353. The latter case is precisely in point here, it being held that the passenger, having been unable to procure a ticket through the fault or neglect of the railroad company's ticket agent, had a right to be carried at the ticket rate, and that upon tender of that sum to the conductor, his subsequent expulsion from the train was a wrong for which the corporation was liable.

In New York the subject has been regulated to some extent by statute. To ask or receive a greater rate of fare than that allowed by law entitles the passenger to recover the sum of fifty dollars as a penalty. The New York Central Railroad Company is required to keep its ticket-office at Utica open for the sale of tickets for an hour prior to the departure of each train, but it is not required to keep such office open between 11 o'clock, P. M., and 5 o'clock, A. M.; and if a person at any station where a ticket-office is open enters the cars as a passenger without a ticket, the company may charge five cents in addition to the usual fare, which is fixed at two cents per mile. In *Nellis v. New York Central R. R. Co.*, 30 N. Y. 505, where a passenger from Utica entered the train without a ticket, at 1 o'clock, A. M., when the ticket-office was not open, and was compelled to pay the additional five cents, it was held that the penalty was incurred. It was argued there that the case was not within the statute, because the ticket-office was not required to be open at that hour; and upon that point it is said, in the opinion of the court: "It is insisted that because the plaintiff did not do what it was impossible for him to do, to wit, buy a ticket before leaving Utica, he became liable to pay the extra fare. It seems to me the proposition has but to be stated to be rejected as utterly unsound. To compel a passenger to pay a penalty because the company had deprived him of the power to travel for the regular fare would be so oppressive and unjust that it would require a positive provision of a legislative act to induce any tribunal to sanction it." Though that case arose under the statutes of New York, and might have been decided without touching upon the subject discussed in the passage quoted, yet the reasoning of the quotation is so forcible and so directly applicable to the point under consideration here that it may well be deemed an authority. And the fact that a state like New York, largely interested in commerce,

and whose known policy it is, in every proper way, to foster her great corporations engaged in the transportation of passengers, should, by statute, make their right to discriminate in fares depend upon their affording the passenger an opportunity to avail himself of the discrimination, is worth some consideration when the inquiry is whether such a discrimination can be upheld as reasonable without the corresponding obligation upon the carrier.

Opposed to the doctrine already announced, *Crocker v. New London etc. R. R. Co.*, 24 Conn. 249, stands alone, so far as we know. The facts of that case were much like the one at bar, except that the ticket-office was closed for the night, to be opened as usual thereafter. That fact was held as proof that the company had withdrawn its proposition to carry at ticket rates, and was therefore not bound to carry a passenger tendering to the conductor merely the price of a ticket. The law certainly deduces no such conclusion from the fact of closing a ticket-office as was reached in that case; to wit, that the offer to carry at ticket rates was withdrawn. It is a conclusion of fact, and not of law, and we think not at all a legitimate one. The supreme court of Iowa, in citing this case to another point in *State v. Chovin*, 7 Iowa, 204, very properly disclaimed any purpose to be understood as concurring with the case upon the question now under examination. But the Connecticut case can have no application whatever to the inquiry as it arises in the present case; for here the evidence is clear that the offer was not withdrawn,—that the agent was supplied with tickets, and instructed to sell them, and did actually sell them on that occasion to other passengers for Columbus.

The court refused the following instruction asked by the appellant: "If you believe from the evidence that the plaintiff did not apply for and was not refused a ticket, as alleged in his complaint, and that he refused to pay to the conductor of said train the regular and usual fare fixed by said company for a passage paid upon the cars, then the said conductor would have a right to eject the plaintiff from said cars, using no more force than was necessary for that purpose, even though between stations."

The question thus presented is, whether the expulsion, if otherwise rightful, might lawfully occur elsewhere than at a station. This question, in the case before us, does not depend upon a statute. Our general railroad law (1 Gavin and Hord,

516) does not apply to the appellant, and its charter is silent upon the subject. It is said in the briefs, which have evidently been prepared with great care, that the question is without direct authority. The passenger who refuses to pay fare is from that moment an intruder, and wrongfully on the train. He has no lawful right to be carried gratis to the next station. This is too plain to admit of debate. It follows that he may be expelled at once. There may be public considerations, such as the danger of collisions resulting from stopping trains between stations, or the peril to the traveling public consequent upon the increase of speed necessary to regain time thus lost, which justify the enactment of a law that the expulsion must occur at a station. These considerations, however, form no basis for a claim by a passenger to be carried gratuitously from one station to the next. The refusal to give this instruction must reverse the judgment.

Some questions as to the measure of damages are presented. It is argued that the utmost damages recoverable was the difference between the two rates of fare,—fifteen cents,—by paying which all other inconvenience and damage would have been avoided. But no man is bound to submit to even a trifling extortion. If he had a right to be carried for the sum tendered to the conductor, then the expulsion was purely wrongful, and for the consequences thereof the defendant was liable. The plaintiff was under no obligation to purchase even for a trifle the right which was already his own. This principle is elementary.

Could the jury properly give exemplary damages in a case like this? It is argued that a corporation cannot be supposed to act willfully or maliciously, and that therefore the damages cannot go beyond the point of actual compensation. This reasoning is too metaphysical to be applied in testing the civil liability of a corporation. Practically, there is a human intelligence and volition which controls the affairs of a corporation, just like those of an individual, and which may act willfully, maliciously, or recklessly, thus laying the basis for exemplary damages; and therefore whatever rule of damages would apply in a suit against a natural person ought to apply in a suit against a corporation. Any discrimination in that regard would shock the public sense of impartial justice, and would be an unjustifiable innovation. The instructions governing subordinate employees and agents may be devised in such utter disregard of the rights of others, that obedience to

them will result in palpable oppression and gross wrong to individuals. Whether it was so here was a question for the jury.

The president of the railroad company, being a witness, was asked by the appellant to state the rates of passenger fares on the road from Indianapolis to Columbus on the day on which the plaintiff was ejected. The evidence was refused by the court, except in mitigation of damages. We know of no ground upon which that ruling can be maintained, though in this case the error would not reverse the case. The answer that the fare was \$2.10, but when tickets were purchased a discount of fifteen cents was made, was not different from the other evidence on the subject, as we have stated it. It was merely stating the same thing in different language. It is not the law, as argued by the appellee, that the rates of fare must have been fixed by the directors, and appear on the record of their proceedings. A corporation can do many things which need not appear in writing, and it may empower agents other than its directors to regulate all such matters as this.

The judgment is reversed, with costs, and the cause remanded for a new trial.

DISCRIMINATION BETWEEN FARE PAID ON TRAIN AND FARE PAID AT TICKET-OFFICE. — This topic is treated in the note to *Commonwealth v. Pover*, 41 Am. Dec. 483, 484, citing the principal case; note to *Chicago etc. R. R. v. Parks*, 68 Id. 571; *Hilliard v. Gould*, 66 Id. 765. Where a railroad company undertakes to conduct its business by means of tickets, whether it requires, as it may, the possession of a ticket as a prerequisite of entering its cars, or whether it offers a deduction from the regular or advertised rate to one who shall procure a ticket in advance, it is a part of its duty to afford a reasonable opportunity to obtain its tickets: *Swan v. Manchester etc. R. R.*, 132 Mass. 118, citing the principal case.

PASSENGER MAY BE EXPELLED FROM CAR FOR REFUSAL TO PAY TRAIN RATES: *Hilliard v. Gould*, 66 Am. Dec. 765; *Chicago etc. R. R. Co. v. Parks*, 68 Id. 562, and note 571; *Toledo etc. R. R. Co. v. Wright*, 68 Ind. 594, citing the principal case; see note to *Evansville etc. R. R. Co. v. Duncan*, post, p. 328, under "The principal case is cited," etc.

WHETHER PASSENGER MAY BE EXPELLED FROM TRAIN BETWEEN STATIONS: *Terre Haute etc. R. R. Co. v. Vanatta*, 74 Am. Dec. 96, and note 98; *Chicago etc. R. R. Co. v. Parks*, 68 Id. 562, and note 571. The principal case is cited to the point that a passenger refusing to pay train rates is a trespasser, and may be ejected at any place on the line of the road without reference to stations, and without actual danger to his life or person: *Toledo etc. R. R. Co. v. Wright*, 68 Ind. 594.

LIABILITY OF RAILROAD COMPANY FOR WRONGFUL EXPULSION OF PASSENGER FROM TRAIN: See *Sanford v. Eighth Avenue R. R. Co.*, 80 Am. Dec. 286, and note 290.

ESTABLISHMENT AND POSTING BY PRESIDENT OF CORPORATION OF TARIFF OF FREIGHTS AND FARES on railroad, and receipt and appropriation by corporation of fares taken on such tariffs without objection, raises the legal presumption that the president acted by authority of the corporation in thus fixing and posting the tariff: *Hilliard v. Goolb*, 63 Am. Dec. 765; and see *Commonwealth v. Power*, 41 Id. 465, and note 472, upon "Who may Make Regulations for Company."

LIABILITY OF CORPORATION FOR EXEMPLARY DAMAGES: Note to *Hagan v. Providence etc. R. R. Co.*, 62 Am. Dec. 380, 381.

THE PRINCIPAL CASE came again before this court upon exceptions taken at the subsequent trial, and is reported in 38 Ind. 117.

CHICAGO AND GREAT EASTERN RAILWAY COMPANY v. HARNEY.

[28 INDIANA, 28.]

MASTER IS LIABLE FOR INJURY TO SERVANT WHO IS HIRED TO PERFORM PARTICULAR SERVICE, but who is compelled by a fellow-servant to labor at a business much more perilous, and is injured while so engaged.

MASTER IS BOUND TO EMPLOY NONE BUT COMPETENT AND TRUSTWORTHY SERVANTS, so far as reasonable care in their selection can accomplish that end; and if he fails in this, knowing the incompetency or carelessness of those whom he takes into his service, he must answer to his other servants for the consequences which may result to them.

FATHER CANNOT RECOVER FOR INJURIES RECEIVED BY MINOR SON if at the time of the injury the son was in the defendant's service for hire, and the injury was caused by his own negligence, or the negligence of a fellow-servant engaged in the same general employment, unless the defendant was negligent in hiring the co-servant by whose negligence the injury was caused.

ACTION by Harney against the appellant to recover damages for loss of time and for medical attendance upon his minor son, who was injured in the appellant's service. The complaint alleged that the son, who was eighteen years of age and was supported by the plaintiff, was employed as a track-hand under a contract for such service only, made between the plaintiff and defendant, and stipulating for a payment of thirty-nine dollars per month; that while so employed, one Taylor, also in the employ of the company in the capacity of road-master, and having charge of a construction train from which ties were distributed along the road for the repair thereof, without the knowledge or consent of the plaintiff, directed and compelled plaintiff's son to assist him and other of the defendant's employees in loading and distributing ties, which were distributed by being thrown from the train at the points

designated by Taylor while the train was running at a speed of from ten to fifteen miles per hour; that plaintiff's son while so employed was thrown from the train and severely injured by reason of his throwing a tie from the train while it was in motion, which struck a post standing near the track and forming part of the fence at a cattle-guard, and the end of which tie was thrown around with great force by the speed of the car, and projected over the car and struck him, throwing him from the train; that the son did not know that the post was there; that Taylor was incompetent to manage the train, and the defendant had full knowledge of his incompetency when he was hired and when the injuries were received; that neither plaintiff nor his son knew of Taylor's incompetency; that the injuries received were the result of such incompetency, and were not caused by any negligence of the plaintiff or his son. The defendant demurred to the complaint, on the ground that the complaint did not state facts sufficient to constitute a cause of action, and his demurrer was overruled. The verdict was for the plaintiff; and defendant's motion for a new trial was overruled, whereupon this appeal was taken.

E. Walker, for the appellant.

N. R. Lindsay and J. A. Lewis, for the appellee.

By Court, FRAZER, J. We think that the demurrer to the complaint was correctly overruled. According to its averments, the son of the plaintiff was not engaged as a servant of the defendant when the injury occurred, in any sense where the general doctrine can be applied that a master is not liable to a servant for injuries resulting from the fault of a fellow-servant engaged in the same general business. That doctrine has its foundations in justice and policy. The ordinary risks of the service in which one is engaged are usually, in fact, considered in making the engagement and adjusting the wages. And this may, with great propriety, be held to be always so in legal contemplation. Then, also, the servant has, commonly, better opportunities than the master of learning the incompetency or carelessness of his fellow-servant in the same employment. But in this case, it is alleged that the son was at the time not engaged in the service which he was hired to perform, nor indeed in a service which he or his father had consented that he should engage in; but on the contrary, that he was "compelled" by the fellow-servant to labor at a business much more perilous, and was injured while

so engaged. There was then no opportunity to adjust the compensation with a view to the risk. There was no consent to perform the service on any terms. It was a compulsory service; and under such circumstances, neither justice nor policy requires that the master shall be acquitted of responsibility.

Then, again, a master ought to be bound to all the world to employ none but competent and trustworthy servants, so far as reasonable care in their selection can accomplish that end; and if he fails in this, knowing the incompetency or carelessness of those whom he takes into his service, he ought to answer to his other servants for the consequences which may result to them. The master has no right, either moral or legal, to impose upon them, knowingly, a needless peril. The complaint alleges that Taylor, the road-master, was incompetent to manage the train, and that that fact was known to the defendant when he was employed, and not known to either the plaintiff or his son.

So, then, for both reasons, the complaint was sufficient. The first is so obvious that we are not aware that the exact question has ever been contested in any court, and therefore direct authority has not come under our notice. The second point is supported by numerous cases, among which are *Tarrant v. Webb*, 18 Com. B. 797; *Mad River etc. R. R. Co. v. Barber*, 5 Ohio St. 541 [67 Am. Dec. 312]; *Keegan v. Western R. R. Co.*, 8 N. Y. 175 [59 Am. Dec. 476]; *Perry v. Marsh*, 25 Ala. 659; *Patterson v. Wallace*, 28 Eng. L. & Eq. 48.

The answer was in four paragraphs: 1. General denial; 2. That the son was a servant of the defendant, and was injured in the performance of his duty as such as the result of accident, and not in consequence of any negligence or misconduct of the officers of the defendant; 3. That the defendant was ignorant of the son's minority, and that he went on the tie-train voluntarily, and not by compulsion; 4. That the injury was occasioned by the co-servants in the same service.

The reply was a general denial. The issues were tried by a jury, and a verdict for the plaintiff, assessing his damages at \$575, was returned. A motion by the defendant for a new trial was overruled, and judgment rendered on the verdict. It is insisted here that a new trial should have been awarded.

The evidence utterly failed to show Taylor's incompetency as road-master. There was some contradiction as to the nature of the employment, whether the hiring was to serve gen-

erally as a track-hand, or whether the son was to be confined to work on a particular portion of the road, not including service on the tie-train. It was shown that the son went upon Taylor's request voluntarily upon the train, but without the plaintiff's knowledge or consent, to distribute ties, and was injured while doing so in the manner alleged in the complaint; and it appeared to be the custom on the defendant's road for section-hands employed to repair the road to labor upon the tie-trains in distributing ties whenever the road-master, who had control of them and of that train, so directed. The evidence was conflicting as to the speed of the train when the injury occurred. There was also some conflict as to whether there was any negligence or want of skill on the part of Taylor at the time. There was some evidence tending to show that the negligence of the son, and his disregard of Taylor's directions, produced the injury; but this was also controverted by proof tending to show the contrary. The son was an infant, aged eighteen years, though apparently of mature growth, and the plaintiff hired him to the defendant, and received his wages.

Objection is made to instructions given to the jury; but we do not perceive any error in them, and we do not present them in detail for the reason that no useful purpose would be accomplished thereby. The objection made that they assume facts not in evidence is, we think, not true in fact. The questions of fact were all left to the jury.

But the court below did err, greatly to the prejudice of the defendant doubtless, in refusing the first and fifth instructions asked by the defendant. The first was, in substance, that if at the time of the injury the son was in the defendant's service for hire, and the injury was caused by his own negligence, or the negligence of a fellow-servant engaged in the same general employment, the verdict must be for the defendant, unless the defendant was negligent in hiring the co-servant by whose negligence the injury was caused. This is good law, and was applicable to the evidence. The fifth was similar in effect, with the addition of the proposition that the minority of the son would in such a case make no difference.

Various other instructions were asked and refused, we think properly. They seem to us liable to objection, either because they do not definitely state the law, or because they were not applicable to the evidence. It is not necessary to prolong this opinion by stating them specifically.

It is urged, also, that the verdict is against the evidence.

As it is not necessary for us, under the circumstances, to express an opinion on that subject, we deem it best not to do so, for the reason that the case upon the next trial may present very different facts, and we do not wish to occupy the field of investigation belonging to the jury which shall hereafter be charged with it. The frequency of this class of cases, and those of kindred character, and the facility with which damages are often recovered, seems to justify the general remark here, that it is often the duty of the judge presiding *ad nisi prius* to interfere with verdicts where this court, consistently with the established rules by which it is governed, cannot interpose. That judge has opportunities of estimating the value of the evidence which this court has not. Here, much weight attaches and is due to the fact that, seeing and hearing the witnesses face to face, he has refused a new trial. It has been questioned whether the court of last resort should possess the power to order a new trial upon the evidence, no error of law existing on the record. However that may be, it is certain that no case should ever exist where this court could rightfully reverse the judgment upon that ground.

The judgment is reversed, with costs, and the cause remanded for a new trial.

LIABILITY OF MASTER FOR INJURY TO SERVANT FROM NEGLIGENCE OF FELLOW-SERVANT: See *Gilman v. Eastern R. R. Corp.*, 87 Am. Dec. 635, and cases cited in the note 640; *Donaldson v. Mississippi etc. R. R. Co.*, 87 Id. 391, and note 400; *Louisville etc. R. R. v. Collins*, 87 Id. 486, and note 492.

SERVANT ASSUMES RISK OF HIS EMPLOYMENT: *Gilman v. Eastern R. R. Corp.*, 87 Am. Dec. 635, and note 639.

WHO ARE FELLOW-SERVANTS ENGAGED IN COMMON EMPLOYMENT: *Gilman v. Eastern R. R. Corp.*, 87 Am. Dec. 635, and note 639; *Donaldson v. Mississippi etc. R. R.*, 87 Id. 391, and note 400. Though the negligent servant is the superior of the injured servant, the master may be liable if they are engaged in a common employment: *Thayer v. St. Louis etc. R. R. Co.*, 85 Id. 409, and note 413; *Louisville etc. R. R. Co. v. Collins*, 87 Id. 486, and note 492. In *Gormley v. Ohio etc. R'y Co.*, 72 Ind. 33, it was said that under the later Indiana decisions a servant of a railroad company employed in repairing the track thereof, and one employed in running trains thereon, are engaged in the same general undertaking; and where the former is injured by the negligence of the latter, the company is not liable therefor, notwithstanding a different rule may be deduced from the principal case and other earlier authorities in this state.

MASTER IS BOUND TO SELECT CAREFUL AND SKILLFUL SERVANTS, and is liable to any of their fellow-servants for negligence in this respect: *Gilman v. Eastern R. R. Corp.*, 87 Am. Dec. 635, and note 640; *Snow v. Housatonic R. R. Co.*, 85 Id. 720, and note 730; *Rogers v. Overton*, 87 Ind. 413, citing the principal case. It is the duty of a railroad corporation to use every reason-

able care in the proper construction of its road, and in supplying it with necessary equipment, including properly constructed engines, and the necessary and proper materials for its repair, and the selection of competent, skillful, and trusty subordinates to supervise, inspect, repair, and regulate the machinery, and to regulate and control the operations of the road. If these duties are performed with care and diligence by the directors, and one of the persons so employed is guilty of negligence by which an injury occurs to another, it is not the negligence of the directors or master, and the company is not responsible: *Columbus etc. R'y Co. v. Arnold*, 31 Id. 185, citing the principal case. And while a railroad company is not responsible to one employee for an injury resulting from the mere negligence or incompetence of a co-employee in the same general employment, it is liable in such case where the company has been guilty of negligence in the employment of, or after notice continuing in the employment, the negligent or incompetent employee, thereby conducing to the injury: *Ohio etc. R'y Co. v. Collarn*, 73 Id. 269, citing the principal case.

CONTRIBUTORY NEGLIGENCE PREVENTING RECOVERY: See *Evansville etc. R. R. Co. v. Duncan*, *post*, p. 322, and note.

BLOCH v. ISHAM.

[28 INDIANA, 57.]

COVENANT TO PAY OWNER OF ADJOINING LOT ONE HALF OF COST OF PARTY-WALL erected by him when the covenantor should use the wall is a personal covenant, and does not pass to the grantee of the covenant. OWNERS OF ADJOINING PREMISES ARE NOT TENANTS IN COMMON OF PARTY-WALL, but each owns in severalty the part thereof on his side of the line, with an easement of support from the other part.

ACTION on contract. The opinion states the case.

T. J. Merrifield and W. H. Calkins, for the appellant.

H. A. Gillett, for the appellees.

By Court, GREGORY, J. The case made by the complaint is this: Schenck and Isham, being the owners of adjoining lots in Valparaiso, entered into a written agreement, whereby Schenck acquired the right to build one of the walls of a brick store then in process of erection on his own lot, with one half of its thickness resting on the lot of Isham; and Isham acquired for himself, his heirs or assigns, the right to use said wall by joining a building thereon, and agreed for himself and them to pay one half of the original cost of said wall, when he or they should use the same. Schenck completed the brick store on his lot, with one half of the width of one of its walls standing on Isham's lot. Afterwards Schenck conveyed his

lot and store to Bloch and others, and Bloch subsequently became the sole owner of the lot and its appurtenances; and while he was such owner, Isham built a brick building on his own lot, and used the wall in question. A demurrer was sustained to the complaint.

The only question raised below and here is, whether Bloch has a right to recover of Isham the price to be paid by him for the use of the wall, or whether the right of action is in Schenck. The case turns upon the solution of the question as to whether Isham's agreement to pay for one half of the party-wall is a covenant running with the land.

There is some conflict in the authorities on this point. In *Burlock v. Peck*, 2 Duer, 90, the superior court of New York held that such a covenant passed to the grantee of the premises on which the building of the covenantee was erected. It is otherwise held in Pennsylvania: *Ingles v. Bringham*, 1 Dall. 341; *Todd v. Stokes*, 10 Pa. St. 155; *Gilbert v. Drew*, 10 Id. 219; *Hart v. Kucher*, 5 Serg. & R. 1.

It is claimed that the cases in Pennsylvania turn on a statute. That statute simply provides that "the first builder shall be reimbursed for one moiety of the charge of the party-wall, or for so much as the next builder shall use, before he breaks into the wall." There is nothing in this statute which is not embraced in the agreement of the parties in this case.

Brown v. Pentz, 1 N. Y. Legal Obs. 24, was never officially reported, and we do not recognize it as authority.

But we think that the ruling of the supreme court of Massachusetts in *Weld v. Nichols*, 17 Pick. 538, is conclusive on this question. It was there held that the liability to pay for the party-wall was a mere personal liability, and not repugnant to a covenant in a deed that the land was free from encumbrances.

The easement which passed from Schenck to his grantees was the right to the support of the party-wall afforded by that part thereof which rested upon the land of Isham.

Schenck and Isham were not tenants in common of the party-wall, but each owned the part thereof on his side of the line. Schenck advanced the money to build Isham's moiety, on the agreement of the latter that he or his heirs would repay it when he or they should have occasion to use the wall. This is clearly a mere personal covenant, in no wise connected with or affecting the enjoyment of the lot conveyed to Bloch.

The judgment is affirmed, with costs.

LAW OF PARTY-WALLS. — Definition and Nature of Party-walls, and Law Governing.—Similar to the urban servitude of the civil law, by virtue of which an adjoining owner was entitled to rest a beam or stone of his building in or upon his neighbor's wall, is the easement incident to party-walls existing at the common law. This subject is, however, governed by common-law rules only, from the principles of which must be deduced the rights, duties, and liabilities of adjoining owners; and though assistance upon such questions may be obtained from the French law, which is voluminous in this regard (see extensive excerpts from this law in Washburn on Easements, 4th ed., 623-630), the French or civil law cannot apply when in derogation of the common law except by virtue of legislation: *Sherred v. Cisco*, 4 Sandf. 491. Nor can the legal rights of adjoining lot-owners be affected by a usage or custom prevalent in a city: *Antomarchi v. Russell*, 63 Ala. 356; S. C., 35 Am. Rep. 46. Though if the usage be not contrary to legal principles, it may be fast, "in so large and old a city as New York, to designate a wall as a party-wall may possibly by usage communicate to it certain attributes derived from the understanding and customs of builders and those dealing in the sale of real estate with buildings erected thereon": *Fettrech v. Leamy*, 9 Bosw. 525, per Robertson, J. And in *Gorham v. Gross*, 125 Mass. 232, it is held that, on the issue whether the owner of land in a city, who builds a party-wall under an agreement with the adjoining owner reciting that "any points respecting the same which are not herein specifically provided for shall be decided by the custom in regard to party-walls in said city," is bound to put flues therein for the use of the adjoining owner, an expert may be asked if party-walls in that city are "usually constructed with flues for the accommodation of the adjacent estate."

A party-wall is created as such in three ways only: by contract, actual or presumptive, from long user, between the adjoining owners; by statute: *List v. Hornbook*, 2 W. Va. 340; or by grant from the original owner of two lots, who erects a party-wall between them, and afterwards conveys them to different grantees: See *infra*. It is ordinarily a wall standing partly on the land of each of the adjoining owners, and serving as a division wall between their buildings, and used by both equally for all the purposes of an exterior wall; this use including not only the support of beams and the construction therein of fireplaces and flues, but also the formation of a complete and perfect junction, in an ordinary good mechanical manner, between it and the exterior walls of the houses: *Fettrech v. Leamy*, 9 Bosw. 511; *Nash v. Kemp*, 49 How. Pr. 522; see *Webster v. Stevens*, 5 Duer, 553; *McGittigan v. Evans*, 8 Phila. 264; *Watson v. Gray*, 14 Ch. Div. 192. It is not indispensable, however, that a party-wall should stand equally on the land of each proprietor. Its use as a party-wall is the great criterion; and though its foundation is not laid equally upon the lot of each party, and though after it rises above the foundation it is wholly within the premises of one of them, yet it is a party-wall if used as such, provided its character in other respects is properly established by contract, actual or presumptive, from long user, or by statute: *Western Bank's Appeal*, 102 Pa. St. 171; *Gordon v. Milne*, 10 Phila. 15; *Beaver v. Nutter*, 10 Id. 345. Indeed, though the wall stand wholly upon the land of one proprietor, it may yet become a party-wall if it has been used and enjoyed as such by both proprietors for the prescriptive period; for under such circumstances, the law presumes an agreement between the parties that the wall shall be a party-wall: *Brown v. Werner*, 40 Md. 15; see *Henry v. Koch*, 80 Ky. 391; S. C., 44 Am. Rep. 484; *Rogers v. Sinsheimer*, 50 N. Y. 646.

But a wall which is wholly upon the land of one owner and is not used as such is not a party-wall, and the adjoining owner cannot build into it without his neighbor's permission: *Beaver v. Nutter*, 10 Phila. 345; and if he does so, the neighbor has his action for damages. He cannot recover half the cost of the wall, as there is no contractual relation between the parties; but his action is in tort, and he may recover damages for the trespass: *Abrahams v. Krautler*, 24 Mo. 69; S. C., 66 Am. Dec. 698; *Biogay v. Jeannelot*, 10 Ala. 245; S. C., 44 Am. Dec. 483; *Rankin v. Charless*, 19 Mo. 490; S. C., 61 Am. Dec. 574. But an injunction will not issue after the house has been built, to compel the builder to remove his joists which he has inserted without license in the wall of his neighbor; and the court remarks that "it is allowable for a party to take the redress of wrongs of this character into his own hands. This was a case eminently proper for the exercise of such a right. Had the injury been redressed by the party at the moment it was done, the consequences would have been by no means so serious as they must be at this time by granting the relief prayed," the defendant's house having been completed: *Rankin v. Charless*, *supra*.

Party-wall, how Created. — A division wall may become a party-wall by virtue of the express agreement of the parties; and at the present day, this is the usual method employed, where there is no statute regulating the subject. An adjoining owner, when about to erect a building, agrees with the owner of the adjacent vacant lot that the wall of the building next to the latter's lot shall be erected one half upon the land of each owner, and that the latter shall pay for one half the cost of the wall when he uses it. This is, in brief, the most common form of contract. And under its terms, it is maintained by many decisions that the wall does not take on the character of a party-wall until it is used as such by the owner of the vacant lot: *Glover v. Mersman*, 4 Mo. App. 90; *Molony v. Dixon*, 65 Iowa, 136; S. C., 54 Am. Rep. 1; and see *infra*.

A party-wall may also be created by user as such for the prescriptive period, for from such user a contract between the parties is presumed in the absence of evidence that the use was permissive only: *Brown v. Werner*, 40 Md. 16; *McLaughlin v. Ceconi*, 5 N. E. Rep. 261 (Mass.); *Schile v. Brabakus*, 80 N. Y. 614; *Dowling v. Hennings*, 20 Md. 179; S. C., 83 Am. Dec. 545; *Eno v. Del Vecchio*, 4 Duer, 53; S. C., 6 Id. 17; *Orman v. Day*, 5 Fla. 392, 393; *Cubitt v. Porter*, 8 Barn. & C. 257; *Wiltshire v. Sidford*, 8 Id. 259; *Brown v. Windsor*, 1 Crompt. & J. 20.

And again, it may be created by one who owns both of two adjoining lots, and who builds a wall on the division line thereof, and then conveys; for its use as a party-wall is an open and apparent easement, with the burden and benefit of which his grantees will be reciprocally affected. Therefore, when the owner of two adjoining lots erects a building on each, with a wall partly on each lot for their common support, a conveyance by him of either or both lots conveys with the building an easement for its support on that part of the wall which stands on the other lot: *Webster v. Stevens*, 5 Duer, 553; *Eno v. Del Vecchio*, 4 Id. 53; S. C., 6 Id. 17; *Partridge v. Gilbert*, 15 N. Y. 601; S. C., 69 Am. Dec. 632; *Doyle v. Ritten*, 6 Phila. 577; *Richards v. Rose*, 9 Exch. 218; *Murly v. McDermott*, 8 Ad. & E. 138; *Watson v. Gray*, L. R. 14 Ch. Div. 192. And furthermore, where two persons receive conveyances from the same grantor, with knowledge of the fact that the wall of a building on one of the lots is upon the other lot, the wall is an easement, of which the party owning the building cannot be deprived, and if the other owner attempts to tear down the wall he may be enjoined and required by judgment to repair the

damage he has committed, by placing the wall in its former condition; or the owner of the building may be permitted to do so at his expense: *Henry v. Koch*, 80 Ky. 391; S. C., 44 Am. Rep. 484. An interesting instance of this principle is found in *Rogers v. Sinsheimer*, 50 N. Y. 646, which goes even further than *Henry v. Koch*, *supra*. In *Rogers v. Sinsheimer*, a person owning two adjoining lots erected a house on each, with a party-wall between them. Afterwards he conveyed one lot to the plaintiff's grantor, and one to the defendant's grantor, by deeds recorded the same day. The description in the former deed conveyed the land on which the party-wall stood, and two inches beyond. The plaintiff brought action to recover possession of the strip from the center of the party-wall to the boundary line. And it was held that the plaintiff's premises were charged with a servitude of having the wall stand as an exterior wall to the defendant's house, and as a support to its beams so long at least as the buildings should endure, since the servitude was both continuous and apparent, being one which would be discovered on an inspection of the premises by one reasonably familiar with the subject. And the right to use the party-wall necessarily carried with it the right to occupy the two-inch space with the timbers which were to find support in the wall, and to have the buildings and wall remain as they were at the time of the conveyance from the original owner, while they endure; and actual possession therefore could not be given to the plaintiff. But it was a question whether an action of ejectment would lie, but at all events, all the plaintiff could recover would be the fee, subject to the easement.

If, however, one of the vendees of the original owner has neither actual nor constructive notice of the right granted to his neighbor by the common grantor, to use for purposes of support a division wall which stands wholly upon his land, he will not be bound by it. And the fact that a wooden structure has been built against the wall of a stable, which is of brick, is not sufficient to put the vendee on notice, where to all appearances the wooden erection only adjoined the stable, and was fastened to it by spikes, and a wooden strip of so slight and temporary a character that no one would suppose the brick wall was appurtenant to the wooden building: *Heimbach's Appeal*, 7 Atlantic Rep. 737 (Penn.). In *Price v. McConnell*, 27 Ill. 255, the construction of a deed was involved. The deed conveyed to M. certain premises, extending to the west line of the west wall of a brick building upon the premises, so that it included the whole of the west wall, with the reservation that the owners of the ground on both sides should have the mutual use of the present partition wall. At that time there was a small one-story brick building on the lot adjoining on the west. Subsequently M.'s grantors conveyed this other lot to P., who tore down the small building and erected one much higher and extending farther along on M.'s wall. It was held that the reservation in the deed to M. extended only to such portions of the west wall as were then used as a partition between the buildings, and that P. had no right to the mutual use of any other or greater part of this west wall.

Ownership of Party-walls and Easements Incident thereto. — There are many English and some American decisions which regard the adjoining owners as tenants in common in equal moieties of the party-wall, and of the land on which it stands: *Cubitt v. Porter*, 8 Barn. & C. 257; *Wiltshire v. Silford*, 8 Id. 259; *Watson v. Gray*, L. R. 14 Ch. Div. 192; *Orman v. Day*, 5 Fla. 392, 393; *Montgomery v. Masonic Hall*, 70 Ga. 38; *Brown v. Werner*, 40 Md. 15. But these are cases where the character of party-wall is acquired by long user, and where the actual division line between the adjoining premises is not known, or the wall actually stands wholly upon the land of one owner, in

which case long user by both owners will make them presumptively tenants in common of the wall. "The principle of the decisions is, that while the common user is presumptive evidence of a tenancy in common in the land and wall, that presumption is rebutted by proof of the precise extent of the land originally belonging to each owner, and each is then deemed the exclusive owner of so much of the wall as stands on his own land": *Sherred v. Cisco*, 4 Sand. 490. See also *Matts v. Hawkins*, 5 Taunt. 20; *Wiltshire v. Sidford*, 8 Barn. & C. 259; *Cubitt v. Porter*, 8 Id. 257. Therefore, when the division line of the two lots is known, and a wall is built by one owner, or by both owners at their joint expense, partly upon the land of each, the land covered by the party-wall remains the several property of the owner of each half; and each owner owns in severalty that portion of the party-wall which stands on his land; but the title of each owner is qualified by the easement to which the other is entitled, of supporting his building by means of the half of the wall belonging to his neighbor; and this is all that either can convey: *Gibson v. Holden*, 115 Ill. 199; *Ingals v. Plamondon*, 75 Id. 118, 123; *Hoffman v. Kuhn*, 57 Miss. 750; *Burlock v. Peck*, 2 Duer, 90; *Sherred v. Cisco*, 4 Sand. 480; *Burton v. Moffitt*, 3 Or. 29; *Dauenhauer v. Devine*, 51 Tex. 480; *Jenkins v. Spooner*, 5 Cush. 419; S. C., 52 Am. Dec. 739; *Matts v. Hawkins*, 5 Taunt. 20; *Murly v. McDermott*, 8 Ad. & E. 138. See *Watson v. Gray*, L. R. 14 Ch. Div. 192. Each owner has an easement for the support of his building by the portion of the wall standing upon the land of his neighbor: *Webster v. Stevens*, 5 Duer, 553; *Dowling v. Hennings*, 20 Md. 179; S. C., 83 Am. Dec. 545. And an owner who has consented to the building of a party-wall partly upon his premises cannot tear away such wall after a building has been erected upon the faith of his acquiescence in its location and construction: *Miller v. Brown*, 33 Ohio St. 547. But this easement of support is the only proper easement incident to a party-wall, and it does not include a right to the unobstructed use of a flue which is upon the land of the other owner: *Ingals v. Plamondon*, 75 Ill. 118, 123. See *McLaughlin v. Cecconi*, 5 N. E. Rep. 261. And to affect a purchaser with notice of such an easement, it must be obvious and apparent to any observer; but if such is the case, the purchaser will be bound by the easement: *Ingals v. Plamondon*, *supra*. The easement of support is an easement which attaches to and runs with the land: *Rauson v. Bell*, 46 Ga. 19; and is a valuable appurtenant, which passes with the title to the property: *Hendricks v. Stark*, 37 N. Y. 106; *McGittigan v. Evans*, 8 Phila. 264.

Wall Erected by Tenants. — Where a common wall is erected by tenants for years, although it may be a party-wall as between themselves, it creates no easement binding on the owner of the reversion in fee that can prevent such owner when the term expires from dealing with his property as if no such wall had been erected; and the legal rights of a grantee of a reversioner are the same: *Webster v. Stevens*, 5 Duer, 553.

Party-wall is not Encumbrance; and though it stands partly on the premises conveyed, it will not constitute a breach of the covenant against encumbrances: *Bertram v. Curtis*, 31 Iowa, 46. So one who purchases a hotel and premises at public auction without being informed that part of the walls of the hotel adjoining other buildings are party-walls cannot for that reason refuse to complete the purchase: *Hendricks v. Stark*, 37 N. Y. 106. And in *Weld v. Nichols*, 17 Pick. 538, it is held that the liability of the grantor to pay for a portion of a party-wall is a mere personal liability, and consequently not repugnant to his covenant against encumbrances. But a grant of a privilege to use a wall as a party-wall is not a mere license, but an absolute and

irrevocable grant creating a permanent encumbrance, and constitutes a breach of the covenant against encumbrances: *Giles v. Dwyro*, 1 Duer, 331.

PERFORMANCE OF WORK UPON PARTY-WALL. — Neither owner can interfere with a party-wall to the detriment of the other, or do anything to it which will weaken it, or pull it down, without the other's consent: *Webster v. Stevens*, 5 Duer, 553; *Earl v. Beadleston*, 42 N. Y. Sup. Ct. 294; *Sherred v. Cisco*, 4 Sand. 480; *Eno v. Del Vecchio*, 4 Duer, 53; S. C., 6 Id. 17; *Hoffman v. Kuhn*, 57 Miss. 750; *Dowling v. Hennings*, 20 Md. 179; S. C., 83 Am. Dec. 545. And if he does so, he is liable for the injury caused: *Eno v. Del Vecchio*, *supra*. Neither can change the wall so as to displace the timbers of the other supported by the wall, or in any wise injure or make them insecure: *Montgomery v. Masonic Hall*, 70 Ga. 38. And even in building upon a vacant lot the owner who has a right to use an adjoining wall as a party-wall must use all proper care to prevent injury to his neighbor's house; and the necessity for the exercise of care, caution, and skill is enhanced in proportion to the danger to the adjoining property from the nature of the work to be done: *O'Daniel v. Bakers' Union*, 4 Houst. 488. In case of injury thus caused by work done on the adjoining premises, a landlord can recover only for the injury to the reversion: *Eno v. Del Vecchio*, 4 Duer, 53; S. C., 6 Id. 17.

Repairing, Tearing down, and Reconstructing Party-wall. — Either owner may, however, when it is necessary, repair the party-wall in a careful and skillful manner, with as little damage as possible: *Moore v. Rayner*, 58 Md. 411; *Hoffman v. Kuhn*, 57 Miss. 750. See *Pierce v. Dyer*, 109 Mass. 377. And there is some authority to the effect that the adjoining owner will be liable to contribute to the expense of necessary repairs made by his neighbor: *List v. Hornbrook*, 2 W. Va. 346. See also *Campbell v. Messier*, 4 Johns. Ch. 335; S. C., 8 Am. Dec. 570. At least the adjacent proprietor of a dangerous party-wall who neglects to join in the expense of rebuilding it cannot maintain an action for the inconvenience occasioned by repairs thereon made with due care and dispatch: *Crashaw v. Sumner*, 56 Mo. 517.

So when a party-wall has become so dilapidated as to be unsafe, the owner of one building has the right, upon reasonable notice to the adjoining tenant, to replace it, and if not negligent in so doing, he is not liable in damages: *Schile v. Brokhahus*, 80 N. Y. 614; *Partridge v. Gilbert*, 15 Id. 601; S. C., 69 Am. Dec. 632. But where the taking down of a building will not injure the wall, it is not necessary to give notice of the intention to do so: *Earl v. Beadleston*, 42 N. Y. Sup. Ct. 294.

Ordinarily neither has the right to pull down the party-wall without the other's consent: *Sherred v. Cisco*, 4 Sand. 480; *Eno v. Del Vecchio*, 4 Duer, 53; S. C., 6 Id. 17. And one who tears down part of a party-wall, claiming that it stands entirely upon his own land, and intending to erect a new wall without giving the adjoining owner any benefit from it as a party-wall, is a trespasser, and is liable for the resulting damages, and contributory negligence is no defense, as the action is not based on negligence: *Schile v. Brokhahus*, 80 N. Y. 614. Nor can the adjoining owner destroy the character of the structure as a party-wall. His neighbor has an easement of support in a solid party-wall, and an injunction will be granted to restrain the adjoining owner from cutting away a portion of the face of an ancient party-wall, and erecting a new wall upon his own land at a distance of two inches from that portion of the ancient wall which is left standing and connected with it by occasional projecting bricks and ties: *Phillips v. Bordman*, 4 Allen, 147. Thus the use by S. of the existing easement, a party-wall between the house purchased by M. and S.'s house adjoining, for a purpose antagonistic to

the expressed design of S. in building the houses by which the adjoining house was enlarged, not as a private residence, but for business purposes, may be restrained, though S. would have the right to build upon the party-wall if the object were to enlarge his house as a private residence: *Musgrave v. Sherwood*, 60 How. Pr. 339, reversing S. C., 54 Id. 338. And so where two adjoining dwelling-houses are supported by a wall standing partly on the soil of each owner, which was erected as a party-wall and has been used as such for over twenty years, and one of such owners without the consent of the other removes it while in a sound condition, and suitable and sufficient for the purpose for which it was erected, and erects a store on his lot and a new party-wall, he is liable to the owner of the adjoining lot for any loss of rent caused, and the expense of all repairs made necessary by the removal of the old and the erection of the new party-wall: *Potter v. White*, 6 Bosw. 644. In *Hieatt v. Morris*, 10 Ohio St. 523, S. C., 78 Am. Dec. 280, however, it was held that where two adjoining owners construct a party-wall, and use the same for twenty-one years, under an agreement containing no express stipulation as to the continuance or termination of such joint use, one of the parties may, if he desires to remove the building upon his lot in order to erect another thereon, notify the other of his intention to remove that portion of the wall standing upon his land, and upon the other party refusing to suffer or permit such removal, he may proceed to take the wall down, using due and proper care to prevent injury to that part of the wall standing upon the lot of the other party, without being liable in an action therefor.

Where the owner of a vacant lot who desires to erect a building of certain dimensions on the lot finds that the wall of his neighbor's house, which is built up to the boundary line of the lot, is so thin that the weight of his prospective building, although erected within the bounds of his own lot, would destroy his neighbor's house, he has the legal right to take down the neighboring wall, and replace it by one strong enough to support the building he shall erect. Such reasonable care must be observed by him, however, as will render the inconvenience and loss to his neighbor as small as practicable; and his care must be proportioned to the risk of loss and inconvenience to his neighbor that his undertaking may occasion; and he is liable for whatever actual damage his neglect to take such care may entail: *Gettwerth v. Hedden*, 30 La. Ann., pt. 1, 30. The owner of a party-wall cannot, however, be compelled to take it down at his own expense because it is not of sufficient strength for an erection which his neighbor desires to make on the adjoining premises: *Ferguson v. Fallons*, 2 Phila. 168.

Where a business has been partially interrupted because of the trespass in wrongfully tearing down a party-wall, it is competent to prove upon the question of damages the amount of business previously done, and how much less the business was during the months when the injury occurred than during the corresponding months of the previous year, and the profits upon the business; and where the evidence is sufficient to show that the falling off of business was in consequence of the wrongful acts of the defendant, the loss of profits thus established is a proper item of damages: *Schile v. Brokhahn*, 80 N. Y. 614. See *Brown v. Werner*, 40 Md. 15. The question of diligence in removing wall from which damage arose is one for the jury: *Montgomery v. Masonic Hall*, 70 Ga. 38. Taking down old wall and building new one in its place does not give one tenant in common an action of trespass against his co-tenant, as this does not constitute a complete destruction of the common property: *Cubitt v. Porter*, 8 Barn. & C. 257. And a lessee has no remedy against his lessor for a pulling down of a party-wall and a diminishing of the

area of the leased premises by the owner of the adjoining lot and building, with whom the lessor made an agreement authorizing him to have the party-wall raised to a stipulated height, and to have it continued in a straight line lengthwise, for this agreement does not authorize the acts complained of; and the lessee's remedy, if any, is against the adjoining owner: *Baughers v. Wilkins*, 16 Md. 35; S. C., 77 Am. Dec. 279. The taking down of party-walls in Philadelphia is regulated by statute: *Child v. Napheys*, 112 Pa. St. 504.

Underpinning and Addition to Height. — An adjacent proprietor can lawfully do no work upon the party-wall to the detriment of the rights of his neighbor without the latter's consent; but he may, if he wishes to improve his own premises before the party-wall has become ruinous or incapable of further answering the purposes for which it was erected, underpin the foundation, sink it deeper, and increase, within the limits of his own lot, the thickness, length, or height of the party-wall, if he can do so without injury to the building on the adjoining lot. And to avoid causing such injury, he may shore up and support the original party-wall a reasonable time, to excavate and place a new underpinning beneath it. But he cannot interfere with it in any manner without the consent of the owner of the building, unless he can do so without injuring the building: *Eno v. Del Vecchio*, 4 Duer, 53; S. C., 6 Id. 17; *Brooks v. Curtis*, 50 N. Y. 639; S. C., 10 Am. Rep. 545; *Schile v. Brokhahus*, 80 N. Y. 614; *Andrae v. Haseltine*, 58 Wis. 395; S. C., 46 Am. Rep. 635; *Dowling v. Hennings*, 20 Md. 179; S. C., 83 Am. Dec. 545; *Bradlee v. Christ's Hospital*, 4 Man. & G. 714, 761. Either owner may increase the height of a party-wall if it is strong enough, and if no direct injury to the adjoining building will result: *Musgrave v. Sherwood*, 54 How. Pr. 338; S. C., 60 Id. 339; *Dauenhauer v. Devine*, 51 Tex. 480. And he cannot be restrained from so doing by injunction: *Quinn v. Morse*, 130 Mass. 317; *McLaughlin v. Ceconi*, 5 N. E. Rep. 261 (Mass.). And if one proprietor adds to the height of a party-wall, and the other pulls down the addition, the first may maintain trespass for pulling down so much of it as stood on the half of the wall which was erected on the plaintiff's soil: *Matts v. Hawkins*, 5 Taunt. 20.

Where a lot is conveyed with the right to use the wall of a brick storehouse as a party-wall, the grantee will have the right to cut off the eaves of the storehouse, so far as their projection over his lot interferes with his raising a building on his lot: *Lawrence v. Hough*, 35 N. J. Eq. 371. See also *Pierce v. Lemon*, 2 Houst. 519; *Watson v. Gray*, L. R. 14 Ch. Div. 192. So where the defendant, having obtained by user the right to the half of a wall which adjoined his and the plaintiff's premises as a party-wall, built up the whole wall, and added additional stories to his house, with the knowledge and without objection of the plaintiff, the latter was estopped from disputing the former's right to use and maintain the additional wall. But the defendant had no right to construct a roof thereon in such a manner as to throw water and ice upon the plaintiff's premises; and equity would restrain him from maintaining such a roof after it had been completed: *Brooks v. Curtis*, 4 Lana. 283. And where the defendant occupies the whole of a division wall, of which he and the plaintiff are tenants in common, by occupying with his roof the whole of the top of the wall, and lets into the wall a stone with an inscription on it stating that the wall and the land on which it stands belong to him, this will constitute an actual ouster, and will enable the plaintiff to maintain an action of trespass: *Stedman v. Smith*, 8 El. & B. 1.

But in order that a person may be entitled to build upon a division wall, it must be a party-wall; and accordingly, where, under the deeds through which the grantees deraigned title, one of them took the whole of the divis-

ion wall, which was not a party-wall, the other had no right to build upon the wall; and if any injury was caused to the latter's house by the former removing what the latter had built upon the wall, or by his making repairs in a careful manner, he was not liable therefor: *Moore v. Rayner*, 58 Md. 411.

It has also been held that one owner of a party-wall who has made additions to it for his own convenience is entitled to maintain a bill for contribution from his co-owner when the latter makes use of the additions, and may recover one half the value of the additions at the time they are used, upon the same principle that permits an owner who has rebuilt a dangerous and ruinous party-wall to compel contribution: *Sanders v. Martin*, 2 Lea, 213; S. C., 31 Am. Rep. 598.

Negligent Excavation. — An action on the case lies for a negligent excavation by an adjoining owner on his own lot, causing an injury to the party-wall and the adjoining building: *Moody v. McClelland*, 39 Ala. 45; S. C., 84 Am. Dec. 770; *Brown v. Windsor*, 1 Crompt. & J. 20. But in excavating for a cellar, an adjoining owner has a right to consider that the party-wall is sufficient and erected in the usual manner, and the jury should assume this in determining the question of negligence: *Hart v. Baldwin*, 1 N. Y. Leg. Obs. 139. And a wall not a party-wall, but built to the dividing line of adjacent lots, must be built of such materials and in such manner that the owner of the adjacent lot may excavate with safety the contiguous earth, and dig below it if it become necessary to do so, when he desires to build; and if any damage occur to the wall from such excavations, it must be borne by the owner of the wall, provided the excavations are made with reasonable care: *Richart v. Scott*, 7 Watts, 460; S. C., 32 Am. Dec. 779; *Moody v. McClelland*, *supra*. And where a division wall falls by reason of negligent excavations by a neighbor who gives no notice of his intention to excavate to the adjoining owner, the latter may recover damages therefor sufficient to place the wall and house in as good condition as formerly, and to compensate him for loss of business: *Brown v. Werner*, 40 Md. 15. See also *Shrieve v. Stokes*, 8 B. Mon. 453; and see note to *Charless v. Rankin*, 66 Am. Dec. 647-651; *Lasala v. Holbrook*, 25 Id. 524.

Whether Owner or Contractor Liable for Negligence. — If an injury to a party-wall will necessarily result from the nature of work performed on the premises of one adjoining owner, he will be liable to his neighbor whether the work is done by himself or by a contractor; but if the injury does not result from the nature of the undertaking, but from the negligence or unskillfulness of the contractor, the latter is liable: *Earl v. Beadleston*, 42 N. Y. Sup. Ct. 294. The tearing down of one of two buildings, whose beams rest in the wall, does not involve as a necessary consequence the weakening of the walls. It may be taken down by the use of ordinary care, in such a manner as to leave the wall as strong as it was before. And an owner contracting with a contractor to take his building down is not liable for injuries sustained through the weakening of the wall by the carelessness or unskillfulness of the workmen employed by the contractor: *Id.* But the owner of land who makes a contract with a firm of masons, by which the latter are to furnish all the materials and labor in building a party-wall, is liable in tort to the adjoining owner, after the wall has been completed and accepted, for an injury to his property by the fall of the wall, resulting from its defective and unsafe condition, whether owing to his own negligence or to that of the masons: *Gorham v. Gross*, 125 Mass. 232.

Negligence in Erecting Party-wall. — A wall built by one owner, under an agreement that when the adjacent owner should build against it, and pay

half the cost, it should become a party-wall, is not such until the condition is fulfilled; and the owner building it is responsible to the other for damages caused by its falling by reason of the former's negligence: *Glover v. Mersman*, 4 Mo. App. 90. But an action of contract will not lie by one of two adjoining owners against the other for negligently building a party-wall which fell upon and injured buildings of the plaintiff, though there was a contract entered into between them concerning the building of the wall, and the payment for one half upon the use thereof, the contract, however, containing no stipulation as to the degree of care to be used in its erection. The action in such case is in tort, as the rights and remedies of the parties in this respect are governed by the common law: *Gorham v. Gross*, 117 Mass. 442. One erecting party-wall must make it of sufficient strength to support a building similar to the one of which it forms a part, but he is not bound to make it strong enough to support any kind of a building which may be erected by the adjoining proprietor: *Gilbert v. Woodruff*, 40 Iowa, 320.

PARTY-WALL PROJECTING OVER LAND OF ADJOINING OWNER—INJUNCTION.—A mandatory injunction to take down a party-wall is a matter of discretion with a court of equity, and will not be granted where the defendant erected a party-wall which unintentionally projected in several places slightly beyond the proper line, and over the land of the plaintiff, who was erecting a building at the same time, and who knew that the wall was projecting, but continued building, and paid for the wall, and the defendant completed his building without correcting the projection. But this occupation of part of the plaintiff's lot did not give the defendant any title to it, nor affect the plaintiff's right to damages: *Mayer's Appeal*, 73 Pa. St. 164. But in *Holsten v. Needles*, 5 N. E. Rep. 530 (Ill.), it was held that where the parties agreed to construct a party-wall half on each side of the division line, and one of them, by misrepresentation, succeeded in having the wall built one foot over upon the other's land without his knowledge, the former's possession of the land was wrongful, and no demand of possession was necessary to make it so.

WINDOWS AND OPENINGS IN PARTY-WALL.—A party-wall is a solid wall, without windows or openings in it: *Vansyckel v. Tryon*, 6 Phila. 401; *Roudet v. Bedell*, 1 Id. 360; but see *Pierce v. Lemon*, 2 Houst. 519. And a person erecting a party-wall partly on land of his neighbor cannot subject it to a servitude foreign to its uses as a wall in common, nor injure its capacity as such by making openings in it: *Sullivan v. Graffort*, 35 Iowa, 531; *Milne's Appeal*, 81 Pa. St. 54. And equity will enjoin the construction of a party-wall with openings or windows in it: *Vansyckel v. Tryon*, 6 Phila. 401; *Vollmer's Appeal*, 61 Pa. St. 118; *Dauenhauer v. Devine*, 51 Tex. 480. But see *Pierce v. Lemon*, 2 Houst. 519. For without an agreement between the owners allowing them, windows have no proper place in a party-wall: *St. John v. Sweetney*, 59 How. Pr. 175. And a revocable license by a former owner to erect a party-wall with windows in it is revoked by a sale and conveyance of the land: *Vollmer's Appeal*, 61 Pa. St. 118. Nor has an adjoining owner any right to put windows in a third story of a party-wall, though the adjoining building be but two stories in height: *Dauenhauer v. Devine*, 51 Tex. 480. But see *Weston v. Arnold*, L. R. 8 Ch. App. 1090; S. C., 7 Eng. R. 572. After an injunction prohibiting the part owner of a dividing wall from using openings or windows in the wall of a third story he was constructing, and providing that the wall should be a dead wall if built, the defendant violated the fiat by the insertion of windows. Upon the final trial judgment was rendered for the plaintiff, and it was decreed that "the wall shall be and

remain a dead wall, without windows or openings of any kind; that the said defendant shall wall up with masonry the windows placed in the third story of his said wall, during the pendency of this suit; and in default of his so doing in thirty days, the sheriff of the county shall cause said windows to be walled up, and collect the cost of said defendant, as under execution." And this decree was held to be proper: *Dauenhauer v. Devine*, 51 Tex. 480.

DESTRUCTION OF PARTY-WALL. — If a party-wall which has been jointly built by two adjoining owners, one half on the land of each, is destroyed by fire or otherwise, the easement is at an end; and even if a part of the wall remains standing, there is no obligation resting upon either owner to rebuild the wall, or to unite in or contribute towards rebuilding it. For this would be to impose in perpetuity a servitude which was assumed for a specific purpose. And if one of the proprietors attempts to rebuild upon the wall, the other may enjoin him: *Hoffman v. Kuhn*, 57 Miss. 746; *Sherred v. Cicco*, 4 Sand. 480; *Antomarchi v. Russell*, 63 Ala. 356; S. C., 35 Am. Rep. 40. And if one owner, without the agreement or concurrence of the other, builds a new wall upon the site of the old one, the latter is not bound to contribute to the expense of its erection upon making use of it: *Sherred v. Cicco*, 4 Sand. 480; *Antomarchi v. Russell*, 63 Ala. 356; S. C., 35 Am. Rep. 40. So an agreement by one erecting a building, that the owner of the adjoining lot may use one half of the wall on the line at any time he may choose to build, in consideration of his permitting one half of the wall to be built on his side of the line, does not obligate the one building, and his grantees, to rebuild such wall at his own expense in case the same is destroyed by fire or otherwise: *Huck v. Flentye*, 80 Ill. 258.

EXTENSION OF FRONT WALL BEYOND DIVISION LINE. — The proper use of a party-wall embraces not only the use of the interior face or side of the wall, but also such use of it as is necessary to form a complete and perfect junction, in an ordinary good mechanical manner, between it and the other exterior walls of the house: *Fettreck v. Leamy*, 9 Bosw. 511; *Nash v. Kemp*, 49 How. Pr. 522. But the land lying in front of a party-wall, and between it and the street line, is to be exclusively enjoyed by its owners, freed from any burden or easement growing out of a simple party-wall agreement, and is to be occupied by the adjoining owners according to the boundary lines of their lots for the construction of their fronts: *Nash v. Kemp*, *supra*. Therefore, where a party-wall is placed back from the line of the street by the first builder, and has so remained for more than fifty years after the erection of an adjoining building, the owner of the house first built cannot extend the party-wall to the line of the street without the assent of the other: *Duncan v. Hanbest*, 2 Brewst. 362. And so, also, when a party-wall stands wholly or principally upon the land of one of the owners, the adjoining owner has no right, growing out of his interest in the wall, to extend the front of his building beyond the limits of his lot, though it extends no farther than one half of the party-wall, if this is not necessary to securely maintain it: *Nash v. Kemp*, 49 How. Pr. 522; S. C., 12 Hun, 592, 597; *Fettreck v. Leamy*, 9 Bosw. 510; *Marion v. Johnson*, 23 La. Ann. 597. And an iron pilaster of the building of the party erecting the wall is not a part of the party-wall, and cannot properly be placed so that one half of it will stand on each side of the division line: *Burton v. Moffitt*, 3 Or. 29. And if one of the parties attempts to extend the front of his building beyond the center of the wall which is a wall in common, he may be restrained by injunction, and actual and vindictive damages may be recovered for the tort: *Marion v. Johnson*, 23 La. Ann. 597.

AGREEMENTS RESPECTING ERECTION OF PARTY-WALLS AND PAYMENT THEREFOR. — In a few states there are statutes regulating the rights and liabilities of adjoining owners with respect to party-walls in cities. They are usually, however, defined by a sealed agreement entered into by the parties before the wall is built. And the ordinary form of agreement prescribes in behalf of the two adjoining owners, their heirs and assigns, that either may build a party-wall, half on each lot, and that the other shall pay half the cost of the wall when he uses it. The construction of these agreements and the determination of their legal effect have frequently occupied the attention of the courts, and their decisions form the basis of a large portion of the law of party-walls.

Statute of Frauds. — In the first place, in order to recover for half the cost of the wall, it is not essential that the agreement be in writing, for the building of the party-wall under a parol agreement is such a part performance of the contract as will take it out of the statute of frauds: *Rawson v. Bell*, 46 Ga. 19. See also *Rice v. Roberts*, 24 Wis. 461.

Construction of Various Contracts. — Where a wall is built over on an adjoining lot, under an agreement, for the purpose of forming an alley-way for the benefit of both parties, the owner of the vacant lot, when he builds, must pay for the wall built over the alley as much as for any other part of the wall: *Haines v. Dripe*, 2 Pars. Sel. Cas. 236. And in *Rawson v. Bell*, 46 Ga. 19, it was held that as no time was specified within which the defendant was to build and pay the plaintiff for one half of the wall to be used by him, the law will imply that it was to be done within a reasonable time.

In *Shaw v. Hitchcock*, 119 Mass. 254, two adjoining owners entered into an indenture under seal, whereby either was to have the right to build a party-wall one half on the other's land, and the latter was to have the right at any time to "use as much of the wall as he may choose for the erection of any building," upon contributing to the value of the same. One of the parties, the defendant, had a building one story high on his land, with three sides of brick and the fourth side of wood, resting by permission upon the plaintiff's land. He took down this wooden side, and the plaintiff built in place thereof a wall four stories high, leaving spaces for the timbers of the defendant's building; and the defendant adjusted his timbers into these spaces, and so fitted his building and used the party-wall, but did not otherwise use it. But the plaintiff could not recover the value of the wall so used, since the defendant had not used the wall in the erection of any building. In *Elliston v. Morrison*, 3 Tenn. Ch. 280, a person owning a city lot on which he was about to rebuild, contracted with his neighbor, who owned the adjacent lot, on which there was a frame house, to build a foundation partly on the land of each, the neighbor to repay for the part on his land when he "rebuilt his house and uses said one foot of said foundation, or when he sells the lot." Under this agreement it was held that the executors of the builder could not maintain an action against the neighbor until he actually rebuilt or sold; and that the extension of the frame house by a brick addition in front a few feet to the pavement, resting on the foundation when completed, was not a "rebuilding." And it has also been held that under an agreement that whenever an adjoining owner should use a party-wall by erecting a building, putting the joists of the building into the wall, he should pay one half of its cost, the putting of the joists into the wall was only an incident of the agreement, and if the adjoining owner used the wall as a party-wall, though without making use of the joist-holes, he was liable upon the covenant to pay: *Greenwald v. Kappes*, 31 Ind. 216.

Where two adjoining owners have agreed to build a party-wall jointly, and have built a portion of the wall, when one of them refuses to proceed, the other, who has prepared his materials and planned his building in reliance upon the performance of the contract, is not limited to an action for specific performance, but may, after notice to his neighbor, complete the wall, and recover from him half of the expense. Such an action is not purely an action at law, but is one of equitable cognizance, it being not for a breach of the parol contract, but for money by way of performance: *Rindge v. Baker*, 57 N. Y. 209; S. C., 15 Am. Rep. 475; see also *Masson's Appeal*, 70 Pa. St. 26.

Where one agreed to build a party-wall resting half upon his own land and half upon the land of an adjoining land-owner, furnishing the material and labor therefor, and such adjoining land-owner agreed that upon its completion he would pay one half of the cost thereof, and should own a joint interest therein, and have the right to use it whenever he desired to build upon his own land, and as the land of the adjoining owner did not extend as far north as the wall, it was agreed that the party erecting it should convey to him the small strip of land lying northward of where his line terminated, such contract was absolute, and not conditional; the covenants therein were independent, and the breach of one did not relieve from the obligation of another. Therefore, a conveyance by the party building the wall was not a condition precedent to the enforcement of his claim against the adjoining owner for his proportion of the cost thereof. And a proceeding at law which set out this contract, and sought to enforce it for the purpose of recovering one half of the cost of the wall, was as effectual as a bill for specific performance. Under it the plaintiff obtained a judgment for the money due, while the defendant was protected in his right to the conveyance of the land he purchased: *Ensign v. Sharp*, 72 Ga. 708.

Adjoining Owner is not Liable to Contribute to Expense of Party-wall in Absence of Contract to That Effect. When a wall is erected by the owner of a lot on the boundary line between his own and the adjoining lot, resting partly upon each, the law ordinarily imposes no obligation on the owner of the adjacent lot to contribute to the cost of its erection; nor will a court of equity enjoin him, or a subsequent purchaser, from the use of the wall without making contribution, in the absence of a promise to contribute: *Preiss v. Parker*, 67 Ala. 500; *Antomarchi v. Russell*, 63 Id. 356; S. C., 35 Am. Rep. 40; *Orman v. Day*, 5 Fla. 385; *McCord v. Herrick*, 18 Ill. App. 423; *Wilkins v. Jewett*, 139 Mass. 29; *Sherred v. Cisco*, 4 Sand. 480; *List v. Hornbrook*, 2 W. Va. 340. And there is no duty or obligation on the owners of adjoining lots in a city to join in building a party-wall on the dividing line of the lots: *Sherred v. Cisco*, *supra*. Where, however, there was an old party-wall between two owners, and one, being desirous to build a new house on his lot, pulled down the old house, and with it the party-wall, which was ruinous, and which it was necessary to take down and rebuild, and rebuilt the wall with his new house, it was held by Chancellor Kent that the owner of the adjoining house and lot was bound to contribute ratably to the expense of the new wall, since the wall was ruinous, and the plaintiff was in the exercise of a lawful right when he took it down and erected a new one; and this liability was enforced by a bill in equity for contribution. The adjoining owner was not, however, bound to contribute to building the new wall higher than the old; nor, if materials more costly or of a different nature were used, was he bound to pay any part of the extra expense: *Campbell v. Messier*, 4 Johns, Ch. 335; S. C., 8 Am. Dec. 570. But it seems that this case must be limited rigidly to the facts involved; for in *Sherred v. Cisco*, 4 Sand. 485, which main-

tains the general proposition that without a contract no recovery for a portion of the expense of the wall can be had, the court adverts upon *Campbell v. Messier*, *supra*, and distinguishes it upon the ground that in that case there was an old and ruinous party-wall in existence, which the plaintiff had a right to tear down and rebuild upon notice to the defendant, whereas in *Sherred v. Cisco*, *supra*, there was no party-wall in existence. Yet a contract for contribution may be implied. Thus in *Day v. Caton*, 119 Mass. 513, it is held that in the absence of an express agreement as to payment of the defendant's part, the jury may infer a promise to pay, if the plaintiff undertook and completed the wall with the expectation that the defendant should pay him for it, and the defendant had reason to know that the plaintiff was so acting with that expectation, and allowed him so to act without objection. So in *Huck v. Flentye*, 80 Ill. 258, a wall was built by the owner of a lot over the line, so as to have one half on his lot and one half on the adjoining lot, with the agreement that the owner of the adjoining lot might use the wall without any charge or cost whenever he chose to build on his lot. The wall was subsequently destroyed by fire, and the lot conveyed to another, who had no knowledge of this agreement. The two owners then agreed to build together, and did so, using the foundation of the former wall, and building their party-wall thereon, without any express agreement as to who should pay for the party-wall. But each was liable for the cost of his proportion of the wall; and the grantee of the builder of the former wall, having built the new wall, was entitled to contribution from the other for his proportion of the cost, notwithstanding the agreement which was entered into between the defendant and the plaintiff's grantee.

An action may be maintained on an oral agreement between adjoining owners that one shall erect a party-wall and the other pay half the expense, if the wall is built before any revocation. But if the one agreeing to build receives from the other a notice of sale of his lot before commencing to build, this is a revocation of the license, and the action will not lie: *Rice v. Roberts*, 24 Wis. 461.

Whether Assignee of Builder can Recover on Covenant for Contribution, and whether Assignee of Covenantor is Liable on Covenant. — Upon these questions great learning and research have been spent, and the decisions conflict very materially. Even in the same state different results are reached under facts very slightly varying, and prior decisions are distinguished in a manner sometimes difficult to understand. A general view of the authorities must lead to the conclusion that the subject is by no means as yet "well settled," and will also indicate the importance of great care in draughting such agreements, if it is the intention of the parties to bind their assignees.

The most intricate question presented is perhaps whether such covenants as these are covenants running with the land. Lengthy discussions of this point are to be found in several cases, and the reader is referred to *Gibson v. Holden*, 115 Ill. 199, and the note to the same case in 56 Am. Rep. 151-167. The majority of the authorities maintain that these covenants are not of the nature of covenants running with the land, and that the grantees of the original parties cannot, by reason of their holding the adjoining lots, take advantage of the benefit, or be subjected to the burden of the covenant to pay for one half of a party-wall, but that the right of recovery is personal to the builder, and the obligation to pay, except in certain cases, rests upon the covenantor only; and an agreement of the parties that the covenant shall be binding upon their heirs and assigns, etc., or even that it shall run with the land, is ineffectual: *Gibson v. Holden*, 115 Ill. 199; S. C., 56 Am. Rep. 149;

Holden v. Gibson, 16 Ill. App. 411; *Joy v. Boston etc. Bank*, 115 Mass. 60 (distinguishing *Maine v. Cumston*, 98 Id. 317, and *Standish v. Lawrence*, 111 Id. 111); *Cole v. Hughes*, 54 N. Y. 444; S. C., 13 Am. Rep. 611; *Scott v. McMillan*, 76 N. Y. 141; *Hart v. Lyon*, 90 Id. 663; *Brown v. Pentz*, 5 N. Y. Leg. Obs. 19; *McDonnell v. Culver*, 8 Hun, 155; *Platt v. Eggleston*, 20 Ohio St. 414; *List v. Hornbrook*, 2 W. Va. 340; *Dauids v. Harris*, 9 Pa. St. 531, 504; *Hart v. Kucher*, 5 Serg. & R. 1; *Todd v. Stokes*, 10 Pa. St. 155; *Gilbert v. Drew*, 10 Id. 219. (In Pennsylvania the statute gives the right of compensation to the "builder," but with respect to the principle involved, this is regarded as immaterial in *Gibson v. Holden*, 115 Ill. 199, S. C., 56 Am. Rep. 149, the principal case, and others.) In *Richardson v. Tobey*, 121 Mass. 457, and *Savage v. Mason*, 3 Cush. 500, however, covenants of a like nature were held to run with the land. The covenants were made, however, by owners who originally owned all the lots. Thus in *Savage v. Mason*, *supra*, by an indenture of partition between owners in common of a large number of lots of land in Boston, it was agreed that certain covenants therein contained should run with the land divided. One of the covenants provided, concerning party-walls, that they should be erected on the dividing lines of the lots, and that the owner of the contiguous lot should pay for one half of the wall when he used it. And this covenant, it was held, was one running with the land, the liability to perform and the right to take advantage of which passed with the estates embraced in the partition to the assignees of the original owners; while *Richardson v. Tobey*, *supra*, was a case where an owner of several adjoining lots conveyed one of them by a deed containing a similar covenant, and afterwards conveyed the adjoining lot, and it was held that the first grantee, having built a party-wall, might recover contribution from the second grantee when he used the wall, though he deraigned title through deeds containing covenants against all encumbrances: See also *Maine v. Cumston*, 98 Mass. 317. *Roche v. Ullman*, 104 Ill. 11, also contains *dicta* contrary to the general rule, but the case is restricted in *Gibson v. Holden*, 115 Id. 199; S. C., 56 Am. Rep. 149; see also *Weyman's Ex'rs v. Ringold*, 1 Bradf. 41, 60.

There are, however, weighty authorities which evade the difficult question as to whether the covenant runs with the land, and maintain that under the agreement the builder retains the ownership of the whole wall until it is used, and that the adjoining owner has the right to use so much of the wall as he may require, upon paying for half, when, and not till then, he acquires title to half of the wall. Admitting these premises, it is easy to see that the assignee of the builder may recover, and that the assignee of the adjoining owner may be liable upon the covenant for contribution, since the former will take under his deed the title to the whole wall, and the latter will take only the ground on which it stands, and will have no title in or right to use the party-wall except upon making payment in accordance with the terms of the contract; and this payment is of course properly made to the owner of the wall, namely, to the assignee of the builder. The reasoning is simple and the result sure if the agreement in express terms stipulates that the whole wall shall remain the property of the builder until paid for: *Maine v. Cumston*, 98 Mass. 317. But many cases have gone further, and maintained that the effect is the same if the contract provides that the adjoining owner shall, when he uses the wall, pay one half the "value" thereof, as this indicates an intention that a sale of the one half of the wall shall occur at the time when it is used, and consequently that until that time the title shall remain in the builder; whereas, if the provision is for the payment of one half the "cost" or "expense" of the wall, this is held to denote that the

intention of the parties was that each should be owners of one half of the wall from the time of its erection, with a mere agreement for payment upon user: *Tomblin v. Fish*, 18 Ill. App. 439; *Standish v. Lawrence*, 111 Mass. 111; *Weyman's Ex'rs v. Ringold*, 1 Bradf. 41; *Burlock v. Peck*, 2 Duer, 90; *Brown v. Pentz*, 1 Abb. App. 227; *contra, Hart v. Lyon*, 90 N. Y. 663. The distinction is also recognized in *Gibson v. Holden*, 115 Ill. 199; S. C., 56 Am. Rep. 146; *Joy v. Boston etc. Bank*, 115 Mass. 60; and see *Glover v. Mersman*, 4 Mo. App. 90. The case of *Richardson v. Tobey*, 121 Mass. 457, may seem to apply this rule to the case of a covenant to pay one half the "cost"; but this case is one of peculiar facts, and can hardly have this effect in view of the case of *Joy v. Boston etc. Bank*, 115 Id. 60, which is directly contrary. So *Roche v. Ullman*, 104 Ill. 11, is restricted by *Gibson v. Holden*, 115 Id. 199; S. C., 56 Am. Rep. 149. Where an owner of two lots builds a party-wall upon the division line between them, and then conveys them, there can be no claim for compensation between the grantees: *Doyle v. Ritten*, 6 Phila. 577. The rule ordinarily is, that by building a portion of a party-wall upon the land of another, without a stipulation for leave to remove it, or any agreement between the parties, that portion becomes the property of the owner of the soil: *Jenkins v. Spooner*, 5 Cush. 419; S. C., 52 Am. Dec. 739.

In Iowa, by virtue of the statute, a conveyance of the lot on which the building is erected passes to the grantee the right to recover of the adjacent owner the value of one half the wall when used by him: *Thompson v. Curtis*, 28 Iowa, 229, 232. In Ohio, in the case of *Platt v. Eggleston*, 20 Ohio St. 414, the facts were, that W., the owner of a lot, sold and conveyed one half of it to P., agreeing at the same time, in a separate writing not under seal, that P. might erect one half of the wall of his building on the part of the lot retained, and that W., when he should sell the residue of the lot, would require that the purchaser or his assigns, when they should use the party-wall, pay one half of the expense to P. or his assigns. P. built on his lot, and afterwards conveyed it, "with appurtenances," etc., with full covenants of warranty, to E. W. afterwards conveyed by deed of release to C. the remainder of the lot, without requiring him or his assigns to pay for the moiety of the expense of the party-wall when he should build, nor is it stated that C. was aware of the agreement previously made. C. thereupon built upon his portion of the lot thus purchased, and in building used the party-wall, and it was held in an equitable proceeding by E. that the effect of the agreement was to give P. and his assigns a right in equity to an easement for the support of one half of the wall on the premises retained by W.; that it was immaterial that the agreement was not inserted in the deed to P., nor that it was not under seal, nor that it was not a covenant running with the land; that as the first lot sold was liable to be subjected under the agreement to the burden of the use of the wall for the benefit of the adjoining premises, E., the present owner, was equitably entitled to compensation for one half of the wall from W., and not P.; for this right of compensation passed as an appurtenance to E. by the deed from P.

Where the title to the whole wall is not retained by the builder or his assignees, as the covenant to pay does not run with the land, and there is no privity between the assignee of the adjoining owner and the builder or his assignee, the former is not legally liable on the covenant: Cases cited *supra*; *Cole v. Hughes*, 54 N. Y. 444; S. C., 13 Am. Rep. 611; *Eckleman v. Miller*, 57 Ind. 88. And where the assignee takes without notice of the claim for contribution existing against his grantor, he will certainly sustain no liability thereunder: *Sharp v. Cheatham*, 88 Mo. 498; S. C., 57 Am. Rep. 433; *Kella*

v. *Helm*, 56 Miss. 700; *Sherred v. Cicco*, 4 Sand. 480; distinguishing *Campbell v. Messier*, 4 Johns. Ch. 334; S. C., 8 Am. Dec. 570. But there are authorities to the effect that when the assignee takes with notice of the covenant to pay, he may, at least in equity, be bound thereby when he uses the wall: See *Roche v. Ullman*, 104 Ill. 11, cited and distinguished in *Gibson v. Holden*, 115 Id. 199; S. C., 56 Am. Rep. 149; *Holden v. Gibson*, 16 Ill. App. 411; *Sharp v. Cheatham*, 88 Mo. 498, 503; S. C., 57 Am. Rep. 433. In the last case, the suit was in equity, and it was sought to hold the grantee of a covenantor liable upon the covenant to pay for one half of a party-wall upon user, and it was remarked by Sherwood, J., in delivering the opinion of the court, that an action at law would not lie, as there was no privity of estate or of contract between the parties; but he continued: "This, however, being a proceeding in equity, the rules prevailing in actions at law as to the necessity of the covenant running with the land, as to the necessity of there being a contemporaneous privity of tenure or estate, in order to make the covenant something more than a mere personal one, in order to fasten it upon the land mentioned in the covenant, — does not prevail here, as in contemplation of a court of equity no such privity is essential, nor that the covenant should run with the land. In order to successfully invoke equitable interposition in cases of this sort, all that is necessary is a valid agreement or covenant, and notice thereof to the purchaser. When these things are shown, a court of equity, disregarding the technical rules of law, and looking alone to the substance and justice of the agreement, such as the one now before us, will enforce it as well against the purchaser with notice as against the original party." In the states where statutes prevail, however, the obligation to pay for a moiety of the cost of the party-wall is very generally held to rest upon the owner using the wall, though he is the grantee of the person owning the adjoining lot when the wall was built: *Bertram v. Curtis*, 31 Iowa, 49; *Irwin v. Peterson*, 25 La. Ann. 300; *Ingles v. Bringham*, 1 Dall. 341; *Beaver v. Nutter*, 10 Pa. St. 345; *Haines v. Drips*, 2 Para. Sel. Cas. 236.

And where premises are conveyed by deed expressly subject to a party-wall agreement between the grantor and the owner of the adjoining building, the covenant to pay for the party-wall when used became united with and formed a part of the consideration of the conveyance; and the grantee became liable, under the party-wall agreement, in the same manner as a grantee assuming a mortgage: *Stewart v. Aldrich*, 8 Hun, 241; *Standish v. Lawrence*, 111 Mass. 111; *Brown v. Pents*, 1 Abb. App. 227. But see *Scott v. McMillan*, 76 N. Y. 141.

Where, however, the assignee is not liable on the covenant, it seems that the covenantor will be, though he does not use the wall, for by conveying his lot he has himself put it out of his power to build: *Ransom v. Bell*, 46 Ga. 19.

The party by whose orders a house is erected is the builder, and he is liable for the value of the party-wall, although the house was erected under a contract for a gross sum, "including party-walls," which was paid by him: *Daids v. Harris*, 9 Pa. St. 501.

Remedies to Recover on Agreements; and Pleading and Practice. — On a count for money paid, laid out, and expended, the plaintiff cannot recover one half the value of a party-wall used by the defendant, but only one half of the money actually expended in its erection: *Peck v. Day*, 1 N. Y. Leg. Obs. 312. And where under an agreement a new party-wall is to be erected upon the division line of the two lots, upon the site of the former division wall, in an action for a part of the cost of the wall the defendant cannot interpose the defense that the line was not the true line of division between the lots: *Ketel-*

Ans v. Penfold, 4 E. D. Smith, 122. In order to recover from an adjoining owner a portion of the cost of a party-wall, it is necessary to prove an agreement, and in such an action it is not sufficient for the complainant to allege that the agreements are not in his possession or accessible to him, and therefore, that it is impossible for him to state their terms. It is incumbent on him to show by some proper averment that they contain provisions giving him some title to relief: *McCord v. Herrick*, 18 Ill. App. 423. If the person entitled to recover is dead, his administrator may properly bring the action: *Barlock v. Peck*, 2 Duer, 90. But if the wall is used by the devisees of the covenantor, the action must be brought against them, and not against the personal representatives of the covenantor: *Keteltas v. Penfold*, 4 E. D. Smith, 122. The right to recover on the covenant is a chose in action: *McDonnell v. Culver*, 8 Hun, 155; and subject to attachment and execution like any other chose in action: *Daide v. Harris*, 9 Pa. St. 501, 504. And it may also be barred by the statute of limitations: *List v. Hornbrook*, 2 W. Va. 340. In Wilmington, Delaware, the action for compensation is not within the jurisdiction of a justice of the peace: *Hawkins v. Mendenhall*, 3 Houst. 216. In *Roberts v. Bye*, 30 Pa. St. 375, S. C., 72 Am. Dec. 710, it is held that where it is agreed between the builder and his contractor that the latter is to look to the adjoining owner of a party-wall for half his compensation, as the wall is part of the building, the legal title to which is in the builder, he becomes trustee for the contractor. If he sells his building to a purchaser with notice, the latter becomes substituted as trustee. And to recover his compensation, the contractor must bring his action in the name of his trustee against the adjoining owner, when the claim accrues by the latter's using the wall. But if the builder sells to a *bona fide* purchaser without notice, the latter takes the property divested of the trust, and the contractor's remedy then is an action for moneys had and received against the builder.

STATUTES prevail in several of the states which prescribe the rights and liabilities of adjoining lot-owners in cities with respect to party-walls. They generally provide that an adjoining owner may build a party-wall one half upon the land of his neighbor, and that the latter when he uses the wall is under obligation to pay one half of the cost thereof, and some of the statutes extend these rights and liabilities to the grantees of former owners. Where these statutes prevail, their provisions must, of course, be complied with: *O'Daniel v. Bakers' Union*, 4 Houst. 488; *Zugenbuhler v. Gilliam*, 3 Iowa, 391; *Thomson v. Curtis*, 28 Id. 229; *Bertram v. Curtis*, 31 Id. 49; *Molony v. Dixon*, 65 Id. 136; S. C., 54 Am. Rep. 1; *Graihle v. Houn*, 1 La. Ann. 140; *Florance v. Maillot*, 22 Id. 114; *Ingles v. Bringham*, 1 Dall. 341; *Irwin v. Peterson*, 25 La. Ann. 300; *Haines v. Drips*, 2 Para. Sel. Cas. 236; *Beaver v. Nutter*, 10 Pa. St. 345; *Evans v. Jayne*, 23 Id. 34; *Bell v. Bronson*, 17 Id. 363; *Roberts v. Bye*, 30 Id. 375; S. C., 72 Am. Dec. 710; *Miller v. Elliott*, 5 Cranch C. C. 543.

THE PRINCIPAL CASE IS CITED approvingly in *Gibson v. Holden*, 115 Ill. 146; S. C., 56 Am. Rep. 146, 151. The case of *Platt v. Eggleston*, 20 Ohio St. 414, however, does not follow the doctrine of the principal case. And in *Haslett v. Sinclair*, 76 Ind. 488, it was held that where a person owning a lot of land conveyed a portion of it to another, by a deed containing a covenant in behalf of himself and his heirs and assigns to maintain a partition-fence, a privity of estate existed between the grantees of these two persons by warranty deeds; that the covenant of the original owner was a covenant running with the land, and consequently the grantees of the parcel subject to

the covenant could not recover from the other grantees for repairs upon the partition fence; and the principal case was distinguished on the ground that in that case the agreement was not embodied in the deed conveying the premises, but was a separate and independent agreement, and was not a continuing covenant, but merely a personal contract.

WOMACK v. McQUARRY.

[28 INDIANA, 108.]

TENANT IS NOT RELIEVED FROM HIS EXPRESS CONTRACT TO PAY RENT by the accidental destruction of the building leased, in the absence of a contract to rebuild, unless such relief is expressly stipulated in the lease.

LEASE OF PART OF BUILDING AS CELLAR OR UPPER ROOM forms an exception to the general rule of non-release from payment of rent upon the accidental destruction of the demised premises, for in such case there remains nothing upon which the demise can operate.

WHERE SAW-MILL AND ROOM IN ADJOINING FACTORY ARE LEASED TO SAME PERSON by the same instrument for an entire rent, and both buildings are accidentally destroyed by fire, the lessee is still liable for the rent of the saw-mill, but is released from liability for the rent of the room, and the rent must be apportioned as in the case of a partial eviction of a tenant by title paramount.

ACTION for rent. The opinion states the case.

J. Gavin and G. B. Gryden, for the appellant.

B. W. Wilson, for the appellee.

By Court, FRAZER, J. The appellant sued the appellee to recover rents. The facts were, that the appellant, on the 7th of March, 1864, owned a saw-mill and a woolen factory. The two buildings were separate, but side by side. The machinery of both was propelled by water drawn from the pool of one dam, but each had its separate fore-bay and water-wheel. On that day the saw-mill and one room of the factory building (for a carpenter-shop), which had an entrance from the saw-mill, were leased to the appellee for three years, the appellee agreeing to pay quarterly therefor the sum of three hundred dollars per annum. The appellee took possession of the leased property on the day of the contract; and while in possession, on the 9th of June following, both buildings with their contents, except the water-wheels, basements, and such parts as were protected by the water, were consumed by a fire originating in the carpenter-shop. In December following, Green & Co., real estate agents, caused an advertisement to be published in a newspaper, offering the property for sale. Green

& Co. were authorized by the appellant to sell the property, only subject to the appellee's lease, and the appellant had no part in framing or publishing the advertisement. The property, however, was not sold. After the conflagration neither party exercised any manual control of the property leased.

The question presented is, whether, under the circumstances, the plaintiff can recover rent for the premises after the destruction of the buildings by fire. The general doctrine that, in the absence of a contract to rebuild, a tenant agreeing expressly to pay rent is not relieved of that obligation by the accidental destruction of the building leased, unless it is so provided in the contract, is so well established and understood that it is needless to refer to the authorities supporting it. There are, however, some comparatively recent cases in which an exception to this rule has been held to exist: *Winton v. Cornish*, 5 Ohio, 477; *Kerr v. Merchants' Exchange Co.*, 3 Edw. Ch. 315; *Stockwell v. Hunter*, 11 Met. 448 [45 Am. Dec. 220]; *Graves v. Berdan*, 26 N. Y. 498. This exception applies only to cases where the demise is of part of an entire building, as a cellar or upper room; and it is founded upon the idea that in such cases it is not the intention of the lease to grant any interest in the land, save for the single purpose of the enjoyment of the apartment demised, and that when that enjoyment becomes impossible by reason of the destruction of the building, there remains nothing upon which the demise can operate. The leading one of those cases, *Winton v. Cornish*, *supra*, presented strong reasons of justice and policy for the ruling; the lessee of a lower room, cellar, or part of a building of several stories, in that case, interposing to prevent the erection of a new structure by the landlord. Had he succeeded, a valuable lot in Cincinnati must, in consideration of a yearly rental, probably bearing no reasonable proportion to its value, have remained for over two years unimproved. That no such consequence could have been intended by the parties, it is not easy to controvert. We are satisfied to follow the doctrine of these cases. It is, in the case before us, applicable to the carpenter-shop, but not to the saw-mill. It results that the lessee must pay rent for the latter. As the contract was entire, there must be an abatement of the rent on account of the destruction of the factory. Justice can only be done in the case by apportioning the rent, as in cases where a part of the premises is lost to the tenant by the act of God, or he is

evicted of part by title paramount: Taylor's Landlord and Tenant, secs. 385, 386.

The judgment is reversed, with costs, and the cause remanded for a new trial.

DESTRUCTION OF DEMISED PREMISES BY FIRE, EFFECT OF, ON TENANT'S LIABILITY FOR RENT: See *Hallett v. Wylie*, 3 Am. Dec. 457; *Gates v. Green*, 27 Id. 68, and note; *Linns v. Ross*, 36 Id. 95; *Wall v. Hinds*, 64 Id. 64. Where the hiring is of a room or rooms in a building, destruction of the building by fire puts an end to the lease: *Whitaker v. Hawley*, 25 Kan. 686, citing the principal case. See also *Stockwell v. Hunter*, 45 Am. Dec. 220, and note 225; *Alexander v. Dorsey*, 56 Id. 443, and note 444.

APPORTIONMENT OF RENT IN CASE OF PARTIAL EVICTION: See *Linton v. Hart*, 64 Am. Dec. 691; *Halligan v. Wade*, 74 Id. 108, and note 115. The principal case is cited to the point that where by a single instrument real and personal property are leased for a gross rental, and the personalty is a substantial part of the leased property upon a total destruction by accidental fire, the lessee is entitled to an abatement of the rent, equal to the proportionate rental value of the personalty: *Whitaker v. Hawley*, 25 Kan. 690.

THE PRINCIPAL CASE IS CITED to the point that where there is no covenant in the lease by which the lessor undertakes to repair, he is not bound to do so; nor can the lessee do it and charge him with the cost of it: *Biddle v. Reed*, 33 Ind. 530; and that in a lease of a water-power, as in other leases, no covenant by the lessor to repair will be implied where none is expressed: *Stilten v. Water Works Co.*, 49 Id. 198.

HARBISON v. BANK OF THE STATE OF INDIANA.

[28 INDIANA, 123.]

TIME OF PRESENTMENT MUST BE ALLEGED IN COMPLAINT ON BILL OF EXCHANGE; and an allegation that the bill was "duly presented for payment at the place where payable" is insufficient on demurrer.

PROOF OF FRAUD IN INCEPTION OF BILL OF EXCHANGE casts upon the holder the burden of proving affirmatively that he took it *bona fide* for a valuable consideration.

ACTION upon bill of exchange. The opinion states the case.

L. Q. and C. A. De Bruler, and G. T. B. Carr, for the appellant.

N. F. Malotte and T. R. Coble, for the appellee.

By Court, RAY, J. The appellee brought suit against the appellant, the drawer of a bill of exchange. A demurrer to the complaint was overruled. Issues were formed, and a trial resulted in a finding for the appellee. The alleged defect in the complaint is, that it does not aver the time of presentment. The only allegation in regard to the presentation for payment

is in these words: "That said bill was duly presented for payment at the place where payable, and payment thereof refused." The form given in the code, in an action upon a note payable in bank against the indorsers, is in these words: "Yet C D did not pay the note when it became due upon presentation at the place where payable." This must be regarded as an averment of presentation of the paper when due, and we are not inclined to support any pleading less certain than that required by the code.

It is insisted by the appellee that the words "duly presented for payment at the place where payable" refer not only to the place, but the time of demand; that if it was "duly presented," it must have been presented not only at the proper place, but at the proper time. This, it seems to us, would be but a conclusion of law, and not an averment of the fact from which such a conclusion should result. We have been referred to many cases as supporting the sufficiency of the averment, but they are not in point, as they simply hold that an averment of presentation when due at the place where payable is sufficient, without an allegation of demand upon the maker or drawer in person: *Giles v. Boune*, 2 Chit. 300; *Am-brose v. Hopwood*, 2 Taunt. 61; *De Bergareche v. Pillin*, 3 Bing. 476; *Bush v. Kinnear*, 6 Maule & S. 210.

There are cases, indeed, where after verdict, upon a motion in arrest, such an averment as the one in this complaint has been sustained: *Huffam v. Ellis*, 3 Taunt. 415; *Leffingwell v. White*, 1 Johns. Cas. 99 [1 Am. Dec. 97]. But here the question comes up upon a demurrer, and the finding cannot supply the defect; and as the case must be reversed upon another ground, we do not examine the evidence to see if the proof renders the error harmless.

In *Glenn v. Noble*, 1 Blackf. 104, in *assumpsit* by a payee against the drawer of a bank check, payable fifteen days after date, the bank having refused payment, the declaration averred a presentment of the check for payment after it had become due, according to the custom of merchants, but did not state the day of presentment. Held, that the averment was insufficient on general demurrer.

The language used in *Kohler v. Montgomery*, 17 Ind. 220, would imply that the averment that the paper "was duly presented for payment" was sufficient, but the question was on a motion in arrest, and the case was not decided upon that point. We think the allegation relates rather to the manner

of the presentment than to the time, and that the demurrer should have been sustained to the complaint.

On the trial of the cause, the defendant requested the court to give the following instruction: —

"If the jury believe, from the evidence in this case, that W. G. Laughery, the acceptor of the bill of exchange in the complaint in this case mentioned, obtained the signature of the defendant, James P. Harbison, thereto as drawer thereof, fraudulently, and without any consideration, then the plaintiff cannot recover in this action without showing that it is the *bona fide* holder of said bill of exchange, and that the bank paid a valuable consideration therefor; and the mere production of the bill of exchange in court, and reading the same to the jury, and the possession thereof by the plaintiff, is not sufficient evidence that the bank paid a valuable consideration for the same; and without such evidence, the plaintiff ought not to recover in this suit, and the jury should find for the defendant."

The evidence introduced under the issues made required that this instruction should have been given to the jury, if it correctly stated the law, and we do not think its correctness can be seriously questioned. Mr. Chitty states the law as follows: —

"In an action by the holder of a bill, when it is proved on the trial that the instrument has been lost, or fraudulently or feloniously obtained from the defendant, it is incumbent on the plaintiff to prove that he came to the possession of the instrument *bona fide*, and for a sufficient consideration": Chitty on Bills, 260.

Mr. Edwards, in his work on notes and bills, p. 686, says: "So, if it be shown that the bill or note was obtained by fraud, or made under duress, or given without consideration, for a particular purpose, and dishonestly used for another, the burden of proof is on the plaintiff to show under what circumstances, and for what value, he became the holder." So, in the same work, p. 691, it is said: "Proof that the paper has been lost or stolen from the true owner calls upon the plaintiff to prove his title as a *bona fide* holder. Proof that the paper was obtained or put in circulation fraudulently calls for the same evidence, while it shows a defense to the instrument on the merits, unless the plaintiff shows himself to be a *bona fide* holder for value, thus shutting out the defense." In note 4, p. 410, the same author says that "when a bill or note

is shown to have originated in illegality or fraud, the presumption arises that a subsequent holder gave no value for it; for the law supposes that the original party, not being able to sue upon the instrument himself, has handed it over to another to sue upon it for his benefit. This presumption must be rebutted by the holder showing affirmatively that he gave value." See also 1 Parsons on Notes and Bills, 188, 189.

The case of *Bailey v. Bidwell*, 13 Mees. & W. 73, is directly in point, and fully sustains the view of the law insisted upon by the appellant. To the same effect are the cases of *Holme v. Karsper*, 5 Binn. 469; *Vallett v. Parker*, 6 Wend. 615; *Munroe v. Cooper*, 5 Pick. 412. The instruction should have been given.

The judgment is reversed, with costs, and the court below is directed to grant a new trial and to sustain the demurrer to the complaint.

BURDEN OF PROOF IS UPON PLAINTIFF, WHEN FRAUD OR IRREGULARITY IS SHOWN IN inception of negotiable instrument, to show that he received it in good faith and for value: *Davis v. Bartlett*, 80 Am. Dec. 375, and note citing prior cases 386. The principal case is cited to this effect in *Zook v. Simonson*, 72 Ind. 90; *Baldwin v. Fagan*, 83 Id. 448; *Blair v. Buser*, 1 Wils. (Ind.) 336. But a person who, without deception or fraud, voluntarily accepts a bill of exchange, cannot impose this burden upon the indorsee by showing that he received no consideration for his acceptance: *Hinkley v. Fourth National Bank*, 77 Ind. 476.

AVERMENT OF "DUE NOTICE OF NON-PAYMENT OF NOTE" is not a good averment of notice in apt time: *Armstrong v. Cook*, 30 Ind. 26, citing the principal case. It is also cited to the point that facts, not conclusions of law, must be alleged in the complaint, or it will be held insufficient: *Cobbles v. Tomlinson*, 50 Id. 555.

DUNBAR v. RAWLES.

[28 INDIANA, 225.]

INTENTION OF PARTIES, WHEN NOT INCONSISTENT WITH LEGAL RULES, will control in construction of contracts.

CONTRACT BY WHICH MARES ARE DELIVERED TO PERSON TO WORK AND USE, keeping them upon the place he was then occupying, the mares to become his property upon the payment of one hundred dollars balance of the purchase price, but to remain the property of the original owner until such payment, is a valid contract, and is a conditional sale, not a mortgage.

COURT OF EQUITY WILL NOT TREAT CONDITIONAL SALE as mortgage, except upon equitable grounds and to prevent fraud.

COURT OF EQUITY WILL NOT TREAT CONDITIONAL SALE as MORTGAGE at the instance of a purchaser from the vendee in the conditional sale, who

within an hour after his purchase was fully informed by the vendee that he had no title, and was tendered back the price paid, but refused to receive it and restore the property.

SALE AND DELIVERY OF GOODS UPON CONDITION THAT TITLE SHALL NOT PASS UNTIL PAYMENT OF PRICE vests in the vendee no title which he can convey to a purchaser in good faith and for a valuable consideration. Under such contract, the vendee takes no more than a mere right of possession.

VENDOR IN CONDITIONAL SALE IS ENTITLED TO RECOVER IN REPLEVIN OR TROVER from any purchaser from his vendee the full value of the property, if a return cannot be had, though a less sum was due from the vendee on his contract, for the absolute title is in the vendor.

WHETHER OR NOT PURCHASER FROM VENDEE IN CONDITIONAL SALE may avail himself of the rights of his vendor to acquire title, *quære*.

REPLEVIN. The opinion states the case.

A. Ellison, for the appellant.

J. B. Wade, for the appellee.

By Court, **RAY, J.** The appellee brought his action of replevin for a horse alleged to be in the possession of the appellant and unlawfully detained by him. The cause was submitted to the court for trial, and a special finding of facts was rendered, and the conclusions of law thereon. These were as follows: —

“That the mare described in plaintiff’s affidavit was, together with another one, on the — day of January last, the property of said plaintiff, and on said day he sold and delivered the two to James Jones for \$250, receiving in part pay a sorrel mare at \$150, the remaining \$100 to be afterwards paid by said Jones, the said sorrel mare, taken at \$150 by plaintiff on said sale of the two mares, being the property of one Jennings”; that afterwards, the said Jones made the following parol contract with said Jennings in regard to said two mares, to wit, that said Jennings should have the use of said mares, keep them on the farm which he was then occupying, take care of them, and upon paying Jones one hundred dollars on the first day of next September, they should be the property of said Jennings, but until the making of such payment they were to remain the property of said Jones; that afterwards, Jones, being about to leave the state, and still owing the plaintiff the one hundred dollars of purchase-money on said mares, made a parol agreement with the plaintiff, by which, in consideration of said one hundred dollars, the said mares were sold to the plaintiff, which agreement was made in the pres-

ence of and with the consent of said Jennings, and the plaintiff then and there made a parol agreement with Jennings that he, Jennings, should have the mares to work and use, keeping them on the place Jennings was then occupying, and upon paying plaintiff one hundred dollars by the 1st of September next, they should then be the property of said Jennings, but until the making of said payment they should remain the property of the plaintiff; that no note, security, or evidence of debt was taken for the payment of said one hundred dollars by Jennings, either by Jones or the plaintiff; that afterwards, on the twenty-third day of March last, said Jennings sold said mare now in controversy to defendant for \$150, together with a sow and pigs for \$50, taking in payment defendant's note for \$110 and a colt at \$90, and delivered said mare and the sow and pigs to defendant, and defendant delivered to said Jennings said colt and his note for the \$110; that at the time of making such sale of said mare to defendant, Jennings did not inform him of any claim of plaintiff upon said mare, but within an hour afterwards Jennings went back to defendant and told him that the mare belonged to plaintiff, and wanted to trade back, and tendered back the colt and the note, and requested defendant to let him have the mare and the sow and pigs, but defendant refused so to do; that the plaintiff, on the twenty-fifth day of March last, and before the commencement of this suit, demanded the said mare of said defendant, who then had her in his possession, but defendant refused to give him possession; that said mare was, at the commencement of this suit, of the value of \$150; that plaintiff has sustained damages to the amount of \$1; that said mare was not found or taken by the officer who served the writ of replevin in this action. From which facts the court finds the following conclusions of law: That the plaintiff was, at the time of the commencement of this action, the owner and entitled to the possession of said mare demanded in this suit, and that she then was unlawfully detained by said defendant; that the plaintiff is entitled to recover of and from the defendant the sum of \$150, the value of said mare, and \$1 for his damages for such detention."

It is insisted that, upon the facts found, the conclusions of law are not as stated by the court. The transaction between Jones and Jennings, it is claimed, did not constitute a conditional sale, but was simply a mortgage of the property; and not having been recorded, the appellee is without remedy for

the loss of the remainder of the sum he was to receive for the horse.

In the construction of contracts, the intention of the parties is chiefly to be considered, and that effect given to the contract, if not inconsistent with legal rules. Here the parties have declared that the mares, "until the making of such payment, were to remain the property of said Jones," and "Jennings should have the mares to work and use, keeping them on the place Jennings was then occupying." It cannot be questioned that the parties had the power to make this contract, and that under it the property would remain in Jones: *Barrett v. Pritchard*, 2 Pick. 512 [13 Am. Dec. 449].

The cases of *Shireman v. Jackson*, 14 Ind. 459, and *Hanway v. Wallace*, 18 Id. 377, are not to be distinguished from the case before us. In those cases, and in *Thomas v. Winters*, 12 Id. 322, and *Plummer v. Shirley*, 16 Id. 380, the authorities are so fully referred to and the law so plainly stated as to require no further discussion. But it is said that courts of equity will often treat as a mortgage what at law would be a conditional sale. This, however, is only done upon equitable grounds and to prevent fraud. But upon what ground does the appellant ask for equitable aid? Within an hour after his purchase, and while he was in possession of the property in dispute, he was fully informed that his vendor had no title, and his own property was tendered back to him. He could have protected himself from loss and restored the mare to the control or possession of her owner. He elected rather to stand by his bargain at the expense of the appellee. It is not often that the court is asked to place an equitable construction upon a contract for the protection of such equities.

But it is claimed that the sale by Jones to the appellant was not accompanied by a delivery, and was therefore void under our statute. Upon that subject this language is used in *Forbes v. Marsh*, 15 Conn. 384:—

"The rule of law making the property of one man liable for the debts of others in whose hands it is found is applicable particularly to that property which was once owned by the possessor, and is by him sold or mortgaged to another, and then suffered to remain in his possession. In such cases possession is evidence of fraud, because there is not given to the world the usual evidence of a change of title. The vendor or mortgagor is therefore presumed to remain owner of the property as heretofore. It is otherwise in cases like that before

us. The vendee comes into possession of property which was known to belong to another man. Whether, therefore, the vendee has borrowed it, or hired it, or purchased it, becomes a matter of inquiry, and ought to be ascertained by him who proposes to trust his property upon the faith of this appearance, for the law offers its protecting shield to those who attempt to protect themselves."

This language was applied to the case of a conditional sale. In the case under our consideration, Jennings did not at any time have any title to the mare, but a mere right of possession: *Hart v. Carpenter*, 24 Conn. 427. But whether the result claimed by appellant would follow, it is unnecessary to decide, as no such affirmative conclusion can be drawn from the facts found by the court. The finding is that "the said mares were sold to the plaintiff; . . . the plaintiff then and there made a parol agreement with Jennings that he, Jennings, should have the mares to work and use." The words "should have" certainly do not necessarily imply that he then had them in possession; that they were sold to the appellee would rather imply a delivery to him by Jones.

The appellant objects that the damages are too large; that as Jennings might before the expiration of the time fixed for the payment of the money have acquired title to the mare by the payment of one hundred dollars, the damages cannot exceed that sum, although the time limited had passed. It was held in *Deshon v. Bigelow*, 8 Gray, 159, that a sale and delivery of goods upon condition that the title shall not pass until payment of the price gives the vendee no title which he can convey to a purchaser in good faith and for a valuable consideration. In the case of *Coggill v. Hartford etc. R. R. Co.*, 3 Id. 545, the law is thus stated by Bigelow, J.: "All the cases turn on the principle that the compliance with the conditions of sale and delivery is, by the terms of the contract, precedent to the transfer of the property from the vendor to the vendee. The vendee in such cases acquires no property in the goods. He is only a bailee for a specific purpose. The delivery, which in ordinary cases passes the title to the vendee, must take effect according to the agreement of the parties, and can operate to vest the property only when the contingency contemplated by the contract arises. The vendee, therefore, in such cases, having no title to the property, can pass none to others. He has only a bare right of possession; and those who claim under him, either as creditors or purchasers, can acquire no higher

or better title. Such is the necessary result of carrying into effect the intention of the parties to a conditional sale and delivery. Any other rule would be equivalent to the denial of the validity of such contracts. But they certainly violate no rule of law, nor are they contrary to sound policy. The cases above cited expressly recognize them as legal and valid contracts between the vendor on the one hand, and the vendee and his creditors on the other. If valid to this extent, it necessarily follows that they are so for all purposes. If the property does not pass out of the vendor for one purpose, it certainly does not for another. If it remains in him at all, it is because such is the agreement of the parties, and it cannot be divested by any act of the vendee until the contract is fulfilled. A *bona fide* purchaser, as well as an attaching creditor, must acquire his title through the vendee. If the latter has no title, he can communicate none. The purchaser and attaching creditor are, in this respect, upon the same footing. No equities can intervene to give the former a better right as against the original vendor than the latter; they are *in æquali jure*. Neither of them has a legal title to hold the property. A mere possession by the vendee carries with it no right or authority to transfer the title. That continues in the vendor until the conditions of sale and delivery are complied with by the vendee, or are waived by the vendor. And this constitutes the precise distinction between a sale and delivery of goods on condition, and a sale procured by fraud or false representations on the part of the vendee. In the latter case, the property passes by the sale and delivery, because such was the agreement and intent of the parties. Therefore the vendee, having the property as well as the possession of the goods, can pass a good title to a purchaser who takes the goods in good faith and without notice of the fraud. But the vendor can reclaim the goods by rescinding the contract and avoiding the sale, so long as they remain in the hands of the vendee, or of any one who has taken them with notice of the fraud, or without paying a valuable consideration for them. In such case, the title to the goods is in the vendee, though defeasible at the option of the vendor, because the vendee, or those claiming under him with knowledge of the fraud, cannot honestly or legally hold the property as against him. But in the case of a conditional sale and delivery, the title does not pass from the vendor until the condition is fulfilled. The vendee obtains no right under such sale to dispose of the property, but only to

hold it until the terms of the contract are complied with: *White v. Garden*, 10 Com. B. 919."

To the same effect are *Sargent v. Metcalf*, 5 Gray, 306 [66 Am. Dec. 368]; *Burbank v. Crooker*, 7 Id. 158 [66 Am. Dec. 470]. It would seem from these cases that as the absolute title is in the vendor, and he is entitled to recover in replevin or trover from any purchaser from his vendee, that the measure of his damages must be the value of the property, if a return cannot be had.

The case before us is still stronger than any we have cited, as Jennings was not entitled to the absolute possession of the mares, but only "to work and use them, keeping them on the place he was then occupying." The removal from the place forfeited his right to retain possession.

In the case of *Hart v. Carpenter*, 24 Conn. 427, one Bebee took Carpenter's cow into his possession, under an agreement that he should keep and feed her, paying himself therefor from the milk and butter received and made; and if at any time within four months Bebee should pay for the cow the sum of thirty-five dollars, then the title should vest in him; if not, he was to return the cow in good condition. Bebee did not pay for the cow, but sold and delivered her to Hart for full value, he believing her to be the property of his vendor. Held, that Carpenter was entitled to recover from Bebee, in trover, \$36.50, the full value of the cow, and costs.

This ruling sustains the judgment in the present case. The appellant has not attempted to comply with the condition upon which alone his vendor could have acquired title to the mare; and it is not necessary that we should decide how far he might, had he so chosen, have availed himself of the rights of his vendor to acquire title.

The judgment is affirmed, with five per cent damages, and costs.

INTENTION OF PARTIES TO GOVERN IN INTERPRETATION OF CONTRACTS, when consistent with established rules: See *Hoffman v. Aetna Fire Ins. Co.*, 88 Am. Dec. 337, and note 347, 348; *Williamson v. Smith*, 78 Id. 478, and note 486; *National Fire Ins. Co. v. Crane*, 77 Id. 289.

TITLE TO PROPERTY DOES NOT PASS TO VENDEE IN CONDITIONAL SALE UNTIL PAYMENT HAS BEEN MADE: *Miller v. Steen*, 89 Am. Dec. 124, and note 127, 128; *Domestic Machine Co. v. Arthurhults*, 63 Ind. 325, citing the principal case.

VENDEE IN CONDITIONAL SALE HAS NO TITLE, AND CANNOT TRANSFER TITLE TO BONA FIDE PURCHASER; and the vendor, if guilty of no laches, may reclaim the property from the latter: *Crocker v. Gullifer*, 69 Am. Dec.

118, and note 122; *Burbank v. Crooker*, 66 Id. 470, and note 472; *Bailey v. Harris*, 74 Id. 312, and note 313. The principal case is cited to the point that a vendee in a conditional sale can convey no title to the property, even to a *bona fide* purchaser: *Sims v. Wilson*, 47 Ind. 229; and no title to property so held will pass to a purchaser at an execution sale, under an execution against the vendee: *Bradshaw v. Warner*, 54 Id. 62; *McGirr v. Sell*, 60 Id. 257.

DISTINCTION BETWEEN MORTGAGE AND CONDITIONAL SALE: See *Slowe v. McMurray*, 72 Am. Dec. 251, and note 257.

LAFAYETTE AND INDIANAPOLIS R. R. Co. v. HUFFMAN.

[28 INDIANA, 287.]

ALLEGATION IN COMPLAINT THAT CHILD UNDER FIVE YEARS OF AGE WHO WAS INJURED BY PASSING LOCOMOTIVE was by accident "playing near and on said track at a point near his home," is, unexplained, an admission of negligence on the part of those having the custody of his person; and to render the railroad company liable, its conduct must have been so negligent as to amount to a willingness to inflict injury; and in the absence of such an allegation, the complaint is demurrable.

THERE IS NO DISTINCTION BETWEEN CASE OF CHILD UNNECESSARILY EXPOSED to danger and that of a person of mature years, where the question is one of simple negligence; but where the question becomes one of gross neglect or willful misconduct on the part of the defendant, the rule cannot be the same.

TO RENDER RAILROAD COMPANY LIABLE FOR RUNNING OVER CHILD WHO WAS PLAYING on the track, the complaint must charge either knowledge of the fact that the child was so engaged, or such neglect in keeping a lookout as would have charged the company with negligence if a person of mature judgment had been upon the track.

WORD "WANTON" DOES NOT MEAN WILLFUL, and in an allegation that defendant in a wanton and careless manner ran said locomotive, etc., the word "wanton" adds no force to the charge that the act was done in a careless manner.

TO DEFEAT ACTION FOR NEGLIGENCE, IT IS NOT NECESSARY THAT PLAINTIFF'S NEGLIGENCE should have brought the injury upon himself; if it directly contributed to that result, he cannot recover, where the defendant is chargeable only with want of ordinary prudence.

ACTION for damages. The opinion states the case.

J. S. Tarkington, J. E. McDonald, A. L. Roache, and D. Sheeks, for the appellant.

J. L. Ketcham, for the appellee.

By Court, **RAY, J.** Huffman filed his complaint, alleging "that the railroad company, defendant, on the — day of April, 1865, was running her locomotive and tender on the Union track in Indianapolis, through thickly populated parts

of said city, where persons and children of tender age were frequently passing and repassing across and upon said track, of right, and where children of tender years were frequently known by the employees of said company to be found, requiring the utmost care on the part of those running and managing such locomotive to avoid injury to such persons and children.

"That the plaintiff is a child of tender years, being under the age of five years, and had not prudence and foresight to avoid or apprehend the danger from the movement of such objects, nor to be on the lookout for them.

"That said plaintiff was, on the day aforesaid, by accident, with other children, playing near and on said track, at a point near his home, and said defendant then and there, in a careless and wanton manner, ran said locomotive and tender upon plaintiff and over his legs, crushing the same so that amputation became and was necessary, and his said crushed limb was amputated, whereby he became and is maimed and a cripple for life, said plaintiff not being old enough to exercise prudence or foresight or forethought, or to apprehend danger. Said plaintiff has also suffered great pain, all to the damage of plaintiff," etc.

Valentine Huffman, father, consents to appear as next friend of plaintiff.

A demurrer to this complaint was overruled. It was held in the case of *Pittsburgh etc. R'y Co. v. Vining's Adm'r*, 27 Ind. 513 [*ante*, p. 269], that "the unnecessary exposure to known danger of a child incapable of exercising the care and judgment of mature years is in itself an act of negligence on the part of the parent sufficient to defeat a recovery, unless the injury be willful." The counsel for the appellee in this case insist that, although the question as to the sufficiency of the averment in the complaint that the injury was caused to the child without the fault of the parent was presented by demurrer, and considered in the case cited, yet, as the ruling of the court below on that point was approved, we are not to regard our decision as authority. We do not see any force in the suggestion. But whether authority or not, we are clear that the law was correctly stated, and its application to this case cannot be questioned, even upon the theory advanced.

That the plaintiff, a child under the age of five years, was, by accident, "playing near and on said track, at a point near his home," is, unexplained, an admission of negligence on the

part of those having the custody of his person; and to render the defendant liable, its conduct must have been so negligent as to amount to a willingness to inflict the injury. Is this charged in the complaint? It is averred that the defendant, "in a careless and wanton manner, ran said locomotive," etc., "said plaintiff not being old enough to exercise prudence or foresight or forethought, or to apprehend danger." It appears by the form of this allegation that the negligence charged against the railroad company was such because the plaintiff was not old enough to exercise prudence.

Where the question is one of simple negligence, there is no distinction between the case of a child unnecessarily exposed and that of a person of mature years. Where the question becomes one of gross neglect or willful misconduct on the part of the defendant, the rule cannot be the same. Thus if an engineer of a locomotive discovered a young child on the railroad track, he would be required to use greater effort to stop the train than could have been expected from him if he had discovered a grown person in the same situation. In the latter case, he could reasonably depend more upon the judgment and presence of mind of the person on the track to save himself from danger than in the former case. But children of tender years have no right to play about and upon railroad crossings, and engineers are not required to run their trains expecting to find them so engaged. To render the defendant liable in this case, therefore, the complaint must either charge knowledge of the fact that the child was so engaged, or such neglect in keeping a lookout as would have charged the company with negligence if a person of mature judgment had been upon the track. The complaint is fatally defective. After admitting facts which show negligence of the plaintiff contributing to the injury, it charges that the defendant, in a wanton and careless manner, ran said locomotive, etc. The word "wanton" does not mean willful. It is defined by Webster as follows: "Wandering or roving in gayety or sport; licentious; lewd; extravagant," etc. The word adds no force to the charge that the act was done in a careless manner. The demurrer should have been sustained to the complaint.

On the trial, the following instructions were given, over the exception of the defendant: "It was the duty of defendants, and they were bound, in the management of the engine and tender, to use such diligence and care as prudent and discreet persons should use and exercise on such occasions, having due

regard to the safety of persons; and if owing to the absence of such diligence and care the plaintiff was injured, he is entitled to recover, unless from his own negligence or want of reasonable care he brought the injury upon himself."

It was not necessary that the negligence of the plaintiff should have "brought the injury upon himself"; if it directly contributed to that result, it would have defeated the action, where the defendant was only chargeable with want of ordinary prudence.

The fifth instruction was liable to the same objection. The jury were told that "in determining the question of care and diligence, they should look to all the circumstances attending the transaction, the place where the train was running, the speed with which it was run, as well as the conduct of the plaintiff. Was he negligently and carelessly upon the track? and if so, was the injury the immediate result of such negligence on the part of the plaintiff?"

The court misdirected the jury as to the degree of diligence required of the defendant, in the following instruction: "Although the plaintiff may have been in fault, if the employees of the defendant with reasonable diligence might have avoided the injury, it was their duty to have done so; and their failure to use such diligence would render the defendant liable."

Where the plaintiff is in fault, a want of reasonable diligence will not render the defendant liable.

The judgment is reversed, with costs, and the cause remanded for a new trial.

PERSON CANNOT RECOVER FOR INJURY TO WHICH HIS OWN NEGLIGENCE CONTRIBUTED: See *Evansville etc. R. R. Co. v. Duncan*, *post*, p. 322, and cases cited in the note. It is not necessary that the negligence of the plaintiff should have "brought the injury upon himself." If it directly contributed to that result, the action will be defeated where the defendant was chargeable only with want of ordinary prudence: *Bellefontaine R'y Co. v. Hunter*, 33 Ind. 356, citing the principal case. And it is also cited to the proposition that a complaint for negligence must show, either by direct averment or by the allegation of facts, that there was no contributory negligence, or it is bad on demurrer: *Higgins v. Jeffersonville etc. R. R. Co.*, 52 Id. 111.

DEGREE OF CARE ESSENTIAL TOWARD CHILDREN OF TENDER YEARS, and whether parent's negligence is imputable to child: See *Philadelphia etc. R. R. Co. v. Spearen*, 86 Am. Dec. 544; *Rauch v. Lloyd*, 72 Id. 747, and cases cited in the note 757; *Smith v. O'Connor*, 86 Id. 582, and note 587. The principal case is cited to the point that to allow a child under five years of age to be upon a railroad track unattended, where cars are passing hourly, and where its presence may be undiscovered by the persons in control of trains, is negligence on the part of the parent, and such negligence as will prevent a re-

covery by the parent for an injury to the child through the negligence of the company, unless the injury be willful: *Jeffersonville etc. R. R. Co. v. Bowen*, 40 Ind. 551; *Evansville etc. R. R. Co. v. Wolf*, 59 Id. 92; and this rule applies where the child is the plaintiff: *Hathaway v. Toledo etc. R'y Co.*, 46 Ind. 30.

PERSON RUN OVER AND KILLED UPON TRACK OF RAILROAD COMPANY must be shown to be rightfully there: *Donaldson v. Mississippi R. R. Co.*, 87 Am. Dec. 391, and note 400; and if the person is not rightfully there, the company is not liable for any injury to him, unless it is grossly or willfully negligent: See *Philadelphia etc. R. R. Co. v. Hummell*, 84 Id. 457, and note 460; *Thayer v. St. Louis etc. R. R. Co.*, 85 Id. 409. In an action against a railroad company for running over and killing a man who was walking upon the track, it being charged that there was willful negligence on the part of the railroad company, the court said, citing the principal case: "The simple fact that the deceased was struck and killed by the train, under the circumstances existing in this case, does not tend to prove that the killing was willful. It was the duty of the deceased to have stepped off the track of the railroad; he could see his danger; his personal safety might depend upon his leaving the track; he had the ability to do so at will, while it was not in the power of the train to do so. The presumption was, that he would leave the track at the last moment, at least before being struck; and it may be regarded as established law that those in charge of the train had a right to act upon that presumption till it might be too late to avoid contact. The train, it should be observed, was running very slowly, and its speed was not increased as it neared the deceased, whereby he might have been surprised and confused": *Indianapolis etc. R. R. Co. v. McClaren*, 62 Ind. 573.

EVANSVILLE AND CRAWFORDSVILLE RAILROAD COMPANY v. DUNCAN.

[28 INDIANA, 441.]

COURT WILL JUDICIALLY NOTICE DUTIES OF COMMON CARRIER annexed by law to the contract to carry; and in an action by a passenger against a railroad company for injuries received in alighting, the complaint need not allege the duty of the company to provide a safe mode of exit from the car.

COMPLAINT IN ACTION BY PASSENGER AGAINST RAILROAD COMPANY alleging that the plaintiff was carried to his destination in a box-car which had no steps for the safe descent of passengers, and which was stopped before it reached the platform at the station, and that the plaintiff was required by the conductor to leap from the car to the ground, whereby he received injuries, is not demurrable on the ground that the injury appears to have resulted from rash conduct of the plaintiff.

INSTRUCTION IN ACTION AGAINST RAILROAD COMPANY FOR INJURIES RECEIVED IN JUMPING FROM CAR, that the defendant would be liable if the injuries resulted from the want of proper skill and care on the part of the conductor, is not erroneous, taken in connection with another instruction that if the plaintiff was guilty of negligence in jumping from the car, whereby she was injured, then she could not recover, even if the defendant was also guilty of negligence.

RAILROAD COMPANY IS NOT BOUND TO RECEIVE UNUSUAL NUMBER OF PASSENGERS, beyond what it may be bound to provide with safe accommodations; but if it does receive them without condition or notice of its inability to provide for their safety, it assumes all the obligations usually incumbent upon a carrier of passengers.

PASSENGER CARRIED IN FREIGHT-CAR FROM WHICH NO MEANS OF DESCENT IS PROVIDED, who leaps from the car after the train has stopped at the passenger's destination, and is thereby injured, is not guilty of negligence such as will relieve the carrier from liability, merely because she was not in peril, or had not reason to believe that she was in peril; and an instruction to this effect is properly refused for not containing the further element that the circumstances were such that a person of ordinary prudence would have apprehended danger from the leap.

PASSENGER WHO TO PREVENT BEING CARRIED BEYOND HER DESTINATION VOLUNTARILY JUMPED FROM CAR, from which no means of descent were provided, after the train had stopped at the station, and was injured thereby, was guilty of contributory negligence, since the evidence showed that the leap was dangerous, that she considered it to be such, and that she was warned not to make it.

ACTION for damages. The opinion states the case.

A. C. Donald, for the appellant.

W. M. Land, for the appellee.

By Court, FRAZER, C. J. This was a suit by the appellee against the appellant. The complaint was in two paragraphs, to each of which a demurrer was filed by the defendant, and overruled. An issue was then made by the general denial, the trial of which resulted in a verdict of \$725 for the plaintiff, upon which, over a motion by the defendant for a new trial, judgment was rendered.

The first paragraph of the complaint avers that the defendant was a carrier of passengers by railroad for hire, from Princeton to Fort Branch; that on, etc., the plaintiff, at the defendant's request, became and was received as a passenger from the former to the latter place, etc.; "and thereupon it then and there became and was the duty of the said defendant to use due and proper care and diligence that the plaintiff should be safely and securely carried and conveyed, by and upon said railroad and cars, on the said journey from the town of Princeton aforesaid to the town of Fort Branch aforesaid." But in alleging a breach of this contract on the part of the appellant, the appellee, in this paragraph, after alleging that the appellant "did not use diligence," in general terms, goes on to allege that the appellant "suffered and permitted the plaintiff to be carried and conveyed on said journey in a certain box or stock car, destitute of platform steps or ladders,

by means of which said plaintiff could with safety descend from the same; and also suffered and permitted the locomotive and train of cars aforesaid to stop before the said car wherein the plaintiff was a passenger, as aforesaid, had arrived at the platform or depot at the town of Fort Branch aforesaid, and then and there, by its agent or conductor, ordered and commanded the plaintiff to get off said car, but wholly neglected to provide steps, ladders, platforms, or other means of descent, for the use of the plaintiff, or to use due and proper care and diligence for the safety of the plaintiff in that behalf, and by reason thereof, the plaintiff was compelled to leap from the side of the car aforesaid to the ground, by means whereof, and without the fault or negligence of the plaintiff, one of the ankles of the plaintiff became and was fractured and broken, and she was otherwise greatly bruised and injured." Damages, special and general, were claimed for the injury.

The second paragraph is substantially the same as the first, except that it says nothing about the kind of car in which the plaintiff was conveyed to Fort Branch, or the want of any steps or ladders by which she could descend; and also, excepting the allegation in the first paragraph, that the appellee was ordered by the appellant's "agent or conductor" to get off the train. The allegation in this paragraph of a breach of the contract is that the "train was, by and through the carelessness, negligence, and improper conduct of the said defendant, stopped at the town of Fort Branch aforesaid before that part of the said last-mentioned train on which the plaintiff was a passenger had reached the platform or depot, and the plaintiff, by reason thereof, was compelled to jump from said car to and upon the ground, by means whereof, and without the fault or negligence of the plaintiff, the ankle of the plaintiff became and was fractured," etc.

It is argued, as to both paragraphs: 1. That no breach of the contract alleged is shown, the contract alleged being only to carry safely to Fort Branch, which was fully performed; 2. That the injury appears to have resulted from the rash conduct of the plaintiff herself.

Both paragraphs were, in our opinion, good. As to the second objection, it is sufficient to say that we do not understand from the averments that the rash conduct of the plaintiff produced the injury. The other objection needs a more careful examination. The pleader undertook, unnecessarily, we think, to state the duties which became incumbent upon

the carrier in consequence of having received the plaintiff as a passenger from place to place, and failed to state the very duty the neglect of which produced the injury, to wit, that of providing a safe mode of exit from the car. These duties are annexed by law to the contract to carry; and we are of opinion that the court will judicially take notice of them without any averment as to what they are. *Dudley v. Smith*, 1 Camp. 167, was decided upon this principle. Though the duties of the carrier in reference to a passenger arise out of the contract between them, yet the suit may be in tort, because the duties of the carrier are raised by law: 1 Chit. Pl. 135 et seq. Under the code, it is, in such a case as this, unnecessary to aver the nature of the contract, or the duties resulting from it: Form 14, 2 Gavin and Hord, 377.

The evidence showed that the injury to the plaintiff resulted from jumping from the box-car in which she was carried while the train was standing at Fort Branch. The distance to the ground was about four feet. She jumped in what was deemed by other witnesses a critical place, alighting upon a cross-tie, and thereby fractured her ankle. Provision for safe descent had been made on the other side of the car, but whether before or after her exit is not clear; but she, with many others, did not, at any rate, observe it. Nobody else was hurt. There was some excitement and haste about disembarking, as the train was behind time, the bell was ringing as a signal to get out, and it was understood that passengers for that station must get out quickly or they would be carried on. She thought the car too high to jump from, and was warned not to jump, but nevertheless did so. No proper provision was made for passengers to get out of the box-cars. The only evidence in relation to a command by the conductor to get out was that he said: "All off for Fort Branch; if you do not get off, you will be taken to Evansville." The conductor, testifying as a witness, denied having used any such language. The occurrence took place on the 4th of July. The defendant was provided with sufficient passenger-coaches for all ordinary business, but not enough for such an occasion, and hence used freight-cars. There were celebrations at Fort Branch and Evansville, and there was an unusual number of passengers.

The court gave to the jury the following instruction, claimed by the appellant to be erroneous: "If the jury find there was no want of proper skill or care or caution on the part of the de-

fendant or agent, and that the injury was caused by the act of the plaintiff in rashly and improperly springing from the car, then the defendant is not liable in this action; but if from the want of proper skill and care of the conductor or other person in charge of the train, or if he was guilty of rashness, negligence, or misconduct which placed the passengers in a state of peril in descending from the car, the defendant is liable for any injury resulting from his acts, and the plaintiff is entitled to recover."

It must be stated in this connection that the jury was also instructed that if the plaintiff was guilty of negligence in jumping from the car, whereby she was injured, then the verdict should be for the defendant, even if the defendant was also guilty of negligence. While the instruction complained of was defective, standing alone, yet that defect was fully supplied by the additional instruction stated, and we cannot suppose that the jury disregarded the latter.

The appellant complains also of the refusal of the court to instruct the jury as follows: "If the jury believe from the evidence that the cars, platforms, and means of descent provided by the defendant were at the time sufficient for the ordinary travel on the road, then there would be no negligence in not providing means and platforms for the accommodation of an unusual number of passengers, unless it appear that reasonable notice had been given to provide such accommodations."

We do not think that this instruction should have been given. The defendant was not bound to receive an unusual and unexpected number of passengers beyond what it was bound to provide for with safe accommodations. But having received them without qualification or condition, or notice of its inability to provide for their safety, it seems to us that it assumed all the obligations usually incumbent upon a carrier of passengers, and became liable for the consequences of a failure to perform those obligations.

The following was also refused: "If the jury find from the evidence that the plaintiff leaped from the car without being in peril of life or limb, or having reason to believe that she was in such peril, and by so leaping received the injury, then the verdict should be for the defendant."

We cannot say that it was error to refuse this instruction in this particular case. If the evidence had shown a leaping from a train when in rapid motion, or if the case put by the

instruction had included the element that the plaintiff had leaped from the car under such circumstances that peril to herself might reasonably be apprehended in consequence of the leap, then to make the leap would be a want of reasonable care on her part, and she could not recover. The instruction, however, assumes that leaping from a car under any circumstances, without a purpose to avoid thereby an apprehended peril to life or limb, would relieve the carrier from liability. We do not so understand the law. If the leap was made under such circumstances that a person of ordinary caution and care would not have apprehended danger therefrom, then it was not such an act of carelessness as would relieve the defendant from the responsibility otherwise resting upon it.

It is contended that the evidence was not sufficient to support the verdict. There never should be any just occasion for a reversal of a judgment by this court upon the evidence alone; and it is with the greatest reluctance, and always with a caution so great as to border very closely upon the unreasonable, that we can relieve against this error of the court below, consistently with the rule by which this court has always governed itself in the matter.

In this case the fact comes from the plaintiff herself, testifying as a witness, that for the mere purpose of avoiding being carried to Evansville, she voluntarily made what she regarded as a dangerous leap, and what all other witnesses expressing an opinion upon the subject also regarded as involving peril. This she did, notwithstanding she was warned at the moment not to do it. Thereby she received the injury for which she sues. Upon these points there is no conflict of evidence. The injury occurred thus, if it occurred at all, and these facts are true, if anything in the case is true. There is no room for a question as to the credibility of the witnesses who so testify, for the plaintiff herself is the chief of those witnesses. This, plainly, was a want of ordinary care on her part, directly contributing to the injury; and in such a state of case the law is equally clear that the plaintiff cannot recover. Under such circumstances we cannot hesitate to reverse the judgment.

The judgment is reversed, with costs, and the cause remanded for a new trial.

JUDICIAL NOTICE. — This topic is fully treated in the note to *Lanfear v. Meettier*, 89 Am. Dec. 663 et seq. Upon the liability of passenger carriers to provide safe means of ingress and egress from their conveyances, consult the note to *Hegeman v. Western R. R. Corp.*, 64 Id. 521 et seq.

LEAPING FROM TRAIN UNDER CIRCUMSTANCES THAT WOULD NOT PREVENT PERSON OF ORDINARY PRUDENCE from doing so is not such contributory negligence as will release a railroad company from liability; for authorities supporting this proposition, see the note to *Ingalls v. Bills*, 43 Am. Dec. 364, 365; *Jeffersonville etc. R. R. Co. v. Hendricks*, 41 Ind. 66, citing the principal case. So a passenger may without negligence leap from a vehicle to avoid an actual or apprehended peril: *Ingalls v. Bills*, 43 Am. Dec. 346, and note 365; *Buel v. New York Central R. R. Co.*, 88 Id. 271, and note 274. But a passenger who jumps from a moving train merely to avoid being carried beyond his place of destination cannot recover for injuries suffered: *Pennsylvania R. R. Co. v. Aspell*, 62 Id. 323; *Damont v. New Orleans etc. R. R. Co.*, 61 Id. 214, and note 217; and see *Gavett v. Manchester etc. R. R. Co.*, 77 Id. 422, and note 426; *Lucas v. New Bedford etc. R. R. Co.*, 66 Id. 406; *Galena etc. R. R. Co. v. Fay*, 63 Id. 323; and the note to *Ingalls v. Bills*, *supra*. A passenger must, however, be allowed a sufficient time to alight at his destination: *Pennsylvania R. R. Co. v. Kilgore*, 72 Id. 787.

PERSON CANNOT RECOVER FOR INJURIES OF WHICH HIS OWN NEGLIGENCE was a proximate cause, though the defendant was also negligent: *Donaldson v. Mississippi etc. R. R. Co.*, 87 Am. Dec. 391, and note 400; and see *Johnson v. Winona etc. R. R. Co.*, 88 Id. 83, and note 88; *Butterfield v. Western R. R. Corp.*, 87 Id. 678, and note 682; *Chicago etc. R'y Co. v. Goss*, 84 Id. 755, and note 758; *Spencer v. Milwaukee etc. R. R. Co.*, 84 Id. 758, and note 762; *Zemp v. Wilmington etc. R. R. Co.*, 64 Id. 763; note to *Achtenhagen v. City of Watertown*, 86 Id. 772. The principal case is cited to the point that when negligence is the issue, it must be unmixed negligence to justify a recovery; and if both parties by their negligence immediately contributed to produce the injury, neither can recover. When the plaintiff is the proximate cause of the injury he cannot recover: *Newhouse v. Miller*, 35 Ind. 466.

RAILROAD COMPANY IS BOUND TO PROVIDE SAFE AND SECURE CARRIAGE for the transportation of passengers: *Curtis v. Rochester etc. R. R. Co.*, 75 Am. Dec. 258, and note 268. The principal case is cited to the point that a common carrier having connections with other lines is not bound by its general public obligation to provide other means of transportation than such as it owns, uses, or holds out to the public on its own route for that purpose: *Pittsburgh etc. R'y Co. v. Morton*, 61 Ind. 575.

THE PRINCIPAL CASE IS CITED in *Falkner v. Ohio etc. R'y Co.*, 55 Ind. 372, where it is held that where due notice is given and the necessary means for complying with the regulation is provided, a railroad company has the right to adopt a regulation prohibiting the conductors of its freight trains from carrying passengers thereon, who shall not have previously procured a specified kind of ticket; and where a passenger having notice of and neglecting to comply with such regulation is ejected from the train, with no more force than is necessary, he cannot maintain an action therefor: See *Jeffersonville R. R. Co. v. Rogers*, *ante*, p. 276.

BELL v. EATON.

[28 INDIANA, 468.]

IT IS GOOD DEFENSE TO ACTION FOR BREACH OF MARRIAGE CONTRACT that the plaintiff fraudulently concealed from the defendant the fact that she had been delivered of a bastard child; and an answer setting up such defense is not demurrable.

OBJECTION THAT PLEADING IS ARGUMENTATIVE WILL NOT BE CONSIDERED ON DEMURRER.

ACTION for breach of marriage contract. The opinion states the case.

J. L. Worden and J. Morris, for the appellant.

By Court, RAY, J. This was an action by the appellee, charging the appellant with a breach of a marriage contract. The answer contained two paragraphs; the first was a special denial, and the second as follows: "And for second defense, the defendant says that after the making of the promise and agreement in said complaint mentioned, he learned that the plaintiff had been, prior to his acquaintance with her, delivered of a bastard child; and he avers that through the fraudulent concealment of the plaintiff, he was, at the time of the making of said agreement, ignorant of the fact that the plaintiff had been so delivered of a bastard. Wherefore he demands judgment."

A demurrer was sustained to this paragraph. This was error. If through the fraudulent concealment of the appellee he was kept in ignorance of the fact charged, it was a good defense to the action. If it is objected that the paragraph is argumentative, we must regard the argument as so conclusive as to amount to an express allegation of the facts, when tested by a demurrer.

The judgment is reversed, with costs, and the cause remanded, with directions to overrule the demurrer.

PLAINTIFF'S UNCHASTITY AS DEFENSE TO ACTION FOR BREACH OF PROMISE OF MARRIAGE: Note to *Burnham v. Cornwell*, 63 Am. Dec. 543; and as to a promise of marriage induced by fraud, see *Id.* 536. In support of an answer to a complaint for a breach of promise to marry, which alleged that the plaintiff was an unchaste and immoral woman, who had frequented assignation houses and practiced prostitution, evidence that the plaintiff had lived with a certain woman at a certain place, and at a time when said woman kept a house of assignation and prostitution, is competent: *Hunter v. Hatfield*, 68 Ind. 419, citing the principal case.

ARGUMENTATIVE PLEADING WILL NOT BE HELD BAD ON DEMURRER, the remedy being by motion to make more specific: *Vance v. Schroyer*, 82 Ind. 117, citing the principal case. Uncertainty is not a ground of demurrer under the Indiana code, but of a motion to make more certain: *Snowden v. Wilas*, 81 Am. Dec. 370, and note 373.

RATLIFF v. BALDWIN.

[29 INDIANA, 16.]

AFFIDAVIT IN SUPPORT OF MOTION TO SET ASIDE DEFAULT, DISCLOSING MERITS, and showing that the defendant and his counsel had been in attendance upon the court until the judge announced that the case would not be tried at that term, and that upon the faith thereof they left the court, etc., shows good cause for setting aside the default, and is a basis for the disposition of the application by the judge in a summary way.

ACTION OF COURT IN GRANTING RELIEF ON MOTION TO SET ASIDE DEFAULT, WITHOUT TRIAL OF ANY ISSUE, is not erroneous, although the record disclosed that the affidavit was accompanied by a complaint to review the judgment, upon which an issue was made up, but the answer and reply were not in the record.

WIDOW CANNOT MAINTAIN SUIT TO SET ASIDE HER HUSBAND'S WILL WHILE RETAINING the personal property taken by her under the will, which was in excess of the amount to which she was entitled under the law.

THE opinion states the case.

J. Brownlee, for the appellants.

I. Van Devanter, J. F. McDowell, A. Steele, and R. T. St. John, for the appellee.

By Court, RAY, J. The appellee brought suit against the appellants, who were the executors of the last will of her deceased husband. She claimed that by the law she was entitled to receive three hundred dollars out of the personal estate. A default was taken, and at the next term of the court an application was made by affidavit, accompanied by what seems to have been intended and to have been regarded by both parties as a complaint to review the judgment. An answer was filed and a reply thereto, but neither are in the record before us. A motion was also made upon filing the affidavit to have the default and judgment set aside. The court, without a trial of any issue, sustained the motion. Upon this action of the court, the appellee assigns cross-error. We think the ruling was correct. The affidavit alleged that the appellants had been in attendance upon the court with their counsel until informed by the judge that the case would not be tried

at that term, and they had thereupon returned to their homes. At a subsequent day, an attorney of the court was appointed and acted as judge, and allowed the default. The affidavit also disclosed a defense to the action.

If this application is to be regarded as a simple motion to set aside a default and judgment taken against the appellants through their mistake, inadvertence, surprise, or excusable neglect, under the provisions of the code (2 Gavin and Hord, sec. 99, p. 118), it was proper that the court should dispose of the matter in a summary manner, upon the affidavit and the facts within the knowledge of the judge. Nor can we say that any error was committed, if the complaint is regarded as an attempt to have the judgment reviewed under the provisions of article 28 of the code: 2 Id. 279. As the answers are not in the record, we cannot presume that they tendered any material issues of fact for trial. Every substantial averment of the complaint may have been admitted by the answers, and in that case there could be no error in granting the relief asked.

Upon the default being set aside, the appellants answered, and a trial was had, resulting in a finding for the appellee. This finding we cannot sustain. It appears from the evidence that the appellee took, under the will, personal property of the value of \$752. The remainder of the personal property was sold to pay debts, and a small sum of money remaining was distributed to the appellee and her children. She subsequently brought her action to set aside the will, and in that proceeding she secured a partition of the real estate without regard to the provisions of the will. She now endeavors, while keeping the property she received under the will, to claim also under the law. It is a sufficient answer to this, that she has repudiated the will, and therefore is only entitled to \$300 worth of personal property as widow, and to share with her children in the remaining \$452, whereas she has already received that entire sum; and the remaining personal property having been sold to pay debts, and the real estate divided, nothing remains in the hands of the executors.

The judgment is reversed, with costs.

EFFECT OF JUDGMENT BY DEFAULT: See *Green v. Hamilton*, 77 Am. Dec. 295, and note 302.

SETTING ASIDE DEFAULT, for what purpose allowed: *Browning v. Roane*, 50 Am. Dec. 218; in what cases allowed: *Dial v. Farrow*, 36 Id. 267; practice on setting aside default: Id.; affidavit on, as general rule, must show merits: *Browning v. Roane*, 50 Id. 218.

PREFERENCE OF COLLATERAL RELATIVES OVER WIFE, IN WILL, does not necessarily show undue influence or fraud, nor does it, in the absence of further proof, impeach the validity of the will: *Coffin v. Coffin*, 80 Am. Dec. 235.

THE PRINCIPAL CASE IS CITED and approved as to the practice on an application to set aside a default, in *Buck v. Havens*, 40 Ind. 223; *Fisk v. Baker*, 47 Id. 545; *Nord v. Marty*, 56 Id. 535; *Douglass v. Keehn*, 78 Id. 201; *Lawler v. Couch*, 80 Id. 370; *Brumbaugh v. Stockman*, 83 Id. 588; *Clandy v. Caldwell*, 106 Id. 259. No formal pleadings are necessary in the proceeding, beyond the complaint or motion of the party seeking relief from the judgment, and the matters presented in such complaint or motion should be heard by the court in a summary manner. On such hearing, neither counter-affidavits nor oral evidence tending to contradict the complaint or motion should be received on the question, whether the plaintiff or moving party has or has not a meritorious cause of action or defense, as the case may be: *Clandy v. Caldwell*, 106 Id. 259. When a judgment has been taken by default, the defendants having been personally served, a motion to set aside the default showing merits in the defense or proceedings for relief from the judgment, or to review it, must be made in the court below before appeal: *Barnes v. Conner*, 39 Id. 295, citing the principal case.

ADAMS EXPRESS COMPANY v. REAGAN.

[29 INDIANA, 2L.]

LIMITATION OF COMMON CARRIER'S LIABILITY BY EXPRESS CONTRACT must be reasonable in itself, and not such as to operate as a snare or fraud upon the public.

CONDITION THAT CARRIER SHOULD NOT BE LIABLE FOR LOSS, unless a claim therefor should be presented within thirty days from the date of the receipt, held to be unreasonable and void, in a contract to carry a package from Indiana to Georgia, during the war, and when transportation was much interrupted.

ACTION on an express receipt. The opinion states the facts.

T. A. Hendricks, O. B. Hord, and A. W. Hendricks, for the appellant.

J. L. Ketcham and J. L. Mitchell, for the appellee.

By Court, GREGORY, J. The appellee was the plaintiff below. He sued upon an express receipt, which was made a part of his complaint, and is as follows:—

"ADAMS EXPRESS COMPANY. [Form 14.]

"*Great Eastern, Western, and Southern Express Forwarders.*

"CLAYTON, INDIANA, January 24, 1865.

"Received of A. S. Wills, one carpet valise, containing clothing; value, \$175, marked Maj. Z. S. Reagan, Savannah, Georgia, in good order, which it is mutually agreed is to be

forwarded to our agency nearest or most convenient to destination only, and there delivered to other parties to complete the transportation. It is part of the consideration of this contract, and it is agreed that said express company are forwarders only, and are not to be held liable or responsible for any loss or damage to said property while being conveyed by the carriers to whom the same may be by said express company intrusted, or arising from the dangers of railroads, ocean or river navigation, steam, fire in stores, depots, or in transit, leakage, breakage, or from any cause whatever, unless, in every case, the same be proved to have occurred from fraud or gross negligence of said express company or their servants; nor, in any event, shall the holder hereof demand beyond the sum of fifty dollars, at which the article forwarded is hereby valued, unless otherwise herein expressed, or unless specially insured by them and so specified in this receipt, which receipt shall constitute the limit of the liability of the Adams Express Company. And if the same is intrusted or delivered to any other express company or agent (which said Adams Express Company are hereby authorized to do), such company or person so selected shall be recognized exclusively as the agent of the shipper or owner, and, as such, alone liable, and the Adams Express Company shall not be, in any event, responsible for the negligence or non-performance of any such company or person; nor, in any event, shall said express company be liable for any loss or damage, unless the claim therefor shall be presented to them at this office, within thirty days after this date, in a statement to which this receipt shall be annexed.

"All articles of glass, or contained in glass, or any of a fragile nature, will be taken at shippers' risk only, and the shipper agrees that the company shall not be held responsible for any injury by breakage or otherwise, nor for damages to goods not properly packed and received for transportation. It is further agreed that said company shall not, in any event, be liable for any loss, damage, or detention caused by the acts of God, civil or military authority, or by rebellion, piracy, insurrection, or riot, or the dangers incident to a time of war.

"For the company,

"Freight \$2, pd.

S. B. HALL, Agent."

The complaint alleged that the appellant was on the twenty-fourth day of January, 1865, a common carrier, and by her agent, S. B. Hall, as such carrier, received from A. S. Wills

one carpet valise, containing clothing of the value of \$175, marked "Maj. Z. S. Reagan, Savannah, Georgia," and executed the receipt heretofore set out; that the appellant had wholly failed and refused to deliver said valise and clothing to the appellee.

The appellant answered in two paragraphs. The first alleged that the appellant, in the execution of the contract, safely carried the valise to Hilton Head, on its way to Savannah; that the appellee had then left Savannah with the army, and was in the interior; that there was no communication with the army, and by the order of the military authorities, all articles intended for the army were required to be collected at Hilton Head, and remain there until communication was opened; that when communication was opened with the army, *via* Wilmington, the military authorities required the appellant to turn over the valise, with other articles in its custody intended for the army, to an assistant quartermaster, to be carried by such quartermaster to Wilmington for delivery; that in obedience to this order, the agent of the company did surrender the valise to the military authorities for conveyance and delivery to the appellee at Wilmington, and had not had the custody or control of the valise since that time.

The second answer was a general denial.

The appellee demurred to the first paragraph of the answer, and the demurrer was overruled.

The appellee replied in two paragraphs. The first, that there was no written order made in relation to the valise, and the persons making them were at a post and had the means of giving them in writing. The second was a general denial.

The cause was submitted to the court for trial. The receipt sued on was introduced in evidence. It was also proven that A. S. Wills, the appellee's agent, delivered to the appellant's agent, upon the execution of the receipt, a valise containing wearing apparel of the value of \$175; that Wills had been instructed by the appellee not to ship the articles by express until the company would become responsible for their delivery to him, and that this instruction was communicated to the appellant's agent; that the appellee's agent delayed shipping the valise for a month or more, until Savannah was taken by the federal troops, when he delivered the valise to the appellant, on the 24th of January, 1865, and the receipt was executed; that the appellant delivered other articles shipped about the same time from the same office to persons in the appellee's

regiment; that the appellee sought his valise at the place of delivery, but it was not found, and has never been delivered to him.

The court found for the appellee, and assessed his damages at \$175. The appellant moved for a new trial, but the court overruled the motion, and rendered final judgment on the finding.

It is claimed that the complaint is defective in not averring that the statement of the claim for the loss of the valise was presented to the company at their office at the place of shipment within thirty days after the date of delivery. This case turns upon the validity of the stipulation in the receipt of the company to the agent of the owner of the valise, that "in no event shall said express company be liable for any loss or damage unless the claim therefor shall be presented to them at this office within thirty days after this date, in a statement to which this receipt shall be annexed." It is urged that this being the express contract of the parties, the appellee cannot be excused from performing the condition by the inconvenience, difficulty, or even impossibility of its performance.

It is not necessary for us to go into an examination of the question as to whether a common carrier can limit his liability by express contract. We think it clear, if he can, it must be by conditions reasonable in themselves, and not such as will operate as a snare and a fraud upon the public.

We have been referred to the cases of *Wier v. Adams Express Company*, in the district court of Philadelphia, and *Lewis v. Great Western Railway Co.*, 5 Hurl. & N. 867. In the former case the stipulation is, that the defendants shall not "in any event be liable for any loss or damage, unless the claim therefor shall be presented to them in writing, at their said office, within thirty days after the time when said property has or ought to have been delivered." In the latter case it was provided that "no claim for deficiency, damage, or detention will be allowed, unless made within three days after the delivery of the goods; nor for loss, unless made within seven days of the time they should have been delivered." These conditions were held to be reasonable. But in the case under consideration, the company, in a shipment of a package sent from Clayton, in this state, to Savannah, Georgia, at a time when the country was in an unsettled condition, occasioning great delays in shipments and in the transmission of the mails, attempt to incorporate into their contract a condition precedent, that

they will not answer for any loss or damage, unless the claim therefor shall be presented to them at their office at the former place, within thirty days after the date of the receipt; thus placing it in their power by a delay, which, under the circumstances, would perhaps not have been unreasonable to prevent any claim for loss or damage, however gross might have been their negligence. We think the stipulation in question void, as being against public policy.

We think the complaint good, and that the court below committed no error in overruling the appellant's motion for a new trial.

The judgment is affirmed, with costs.

LIMITATION OF CARRIER'S LIABILITY BY SPECIAL CONTRACT, express or implied: *Cooper v. Berry*, 68 Am. Dec. 468, and note 480; *Steele v. Townsend*, 79 Id. 49; *Baltimore etc. R. R. v. Rathbone*, 88 Id. 664, and note 667.

COMMON CARRIER CANNOT LIMIT LIABILITY BY SPECIAL CONTRACTS, unless they are fairly made, are fully understood by the other party, and are clearly proved: *Adams Express Co. v. Nock*, 87 Am. Dec. 510, and see note 512.

THE PRINCIPAL CASE IS DISTINGUISHED in *United States Express Co. v. Harris*, 51 Ind. 129; it is cited to the point that limitation of carrier's liability by special contract must be reasonable, in *Goggin v. Railroad Co.*, 12 Kan. 419. In New York, a clause in a receipt given by an express company, to the effect that the company would not be liable for loss or damage unless the claim therefor was made in writing, "within thirty days from the accruing of the cause of action," was held not to be in the nature of a condition precedent to the plaintiff's right to recover, as it assumes the existence of a cause of action which has accrued. But had the court come to the conclusion that the clause was a condition precedent, the question would have been open to consideration whether so short a time was reasonable: *Westcott v. Fargo*, 61 N. Y. 542, 551, citing the principal case.

INDIANAPOLIS ETC. R. R. Co. v. RUTHERFORD.

[29 INDIANA, 82.]

EVIDENCE IS ADMISSIBLE UNDER GENERAL DENIAL, in an action for an injury to the person, that the injury resulted from the plaintiff's negligence.

SUBMISSION OF IMPROPER INTERROGATORIES TO JURY IS NOT AVAILABLE ERROR on appeal, when the party objecting could not have been injured thereby.

PLAINTIFF IN ACTION FOR INJURY TO PERSON CANNOT RECOVER, where his own negligence directly contributed to the injury.

DUTY OF PASSENGER CARRIER DOES NOT EXTEND TO IMPRISONMENT OF PASSENGER, so as to prevent him from voluntarily exposing himself to needless peril.

ACTION for injury to the person. The opinion states the facts.

S. P. Oyler and D. W. Howe, for the appellant.

W. R. Harrison and W. S. Shirley, for the appellee.

By Court, FRAZER, C. J. The suit was for injuries received by the plaintiff while a passenger on the defendant's (now appellant) cars. The general denial was pleaded. A special answer, alleging that the injuries resulted from the carelessness of the plaintiff, was stricken out on motion, and this is assigned for error. It was right. The fact could properly be proved under the general denial.

For the same reason, as well as that it was in the discretion of the court to allow, or not, a further answer after the cause was at issue, there was no error in a refusal of leave to file an additional paragraph, of the same legal effect as that which had been stricken out.

The putting of certain interrogatories to the jury is also complained of. We need not determine whether the interrogatories were proper, for the reason that even if they were improper, it would not follow that the judgment must be reversed. We do not say that the putting of improper interrogatories could, in no case, result in injury to a party, but in this case no possible injury could have followed, and hence if there was error in that respect, it is not available here.

The evidence showed that the injury received was a broken arm, and that at the time of the accident the plaintiff's arm was projecting out of the window of the coach in which he rode, in consequence of which it came in contact with some object outside, probably a timber frame supporting a water-tank. The jury found specially, in answer to an interrogatory, that the injury would not have happened if the plaintiff had kept his arm inside the car. In consequence of damages to the main track of the railroad, caused by a recent freshet, the train was on this occasion compelled to pass a short distance upon a side track which was dangerously near to the structure of the water station, if passengers allowed their limbs to protrude a distance of three or four inches outside of the windows of the carriages. The injury occurred by reason of the plaintiff having no notice of the special danger. It did not appear that slats or other appliances were provided to prevent persons from putting their limbs outside the windows.

The jury was instructed as follows: 1. That the mental suffering of the plaintiff might be taken into consideration in fixing the damages, should the verdict be for him; 2. That the same skill and diligence was required of the defendant in running its train temporarily on a side track as on the main track, and if in running on the side track there was a special danger from the close proximity to that track of fixed structures, it would be negligence in the defendant not to notify passengers of such special danger; 3. That the defendant was bound to provide wire gauze, bars, slats, or other barricades, to prevent passengers from putting their arms out of the car windows, and if the plaintiff's arm was casually extended two or three inches outside, and by reason of the close proximity of the water-tank he sustained the injury, the verdict should be for the plaintiff; 4. That if the water-tank was so remote from the track as not reasonably to endanger passengers resting their limbs on the window sill, and casually extending them a little beyond the outer edge of the car, and the plaintiff extended his arm so far beyond the car as to expose it to collision with the tank, such exposure would be negligence on his part, and the verdict should be for the defendant.

These instructions are called in question, as also the refusal of the court on the defendant's motion, to instruct that the plaintiff could not recover if his arm or elbow was protruding out of the window, by reason of which he sustained the injury. Our attention is called to other questions, but in their presentation, the rules of this court, designed to secure intelligibility in argument, and thus enable the court to dispose readily of the business before it, have been disregarded; and hence, as is now our uniform custom, we do not consider those questions.

The sufficiency of the evidence to support the verdict (seven hundred dollars for the plaintiff) is also presented for consideration. This judgment cannot stand. Nothing is better settled than that, in such a case, if the plaintiff's negligence has directly contributed to the injury, he cannot recover. A passenger is as much bound to use reasonable care to avoid injury as the carrier is to use the greatest degree of skill and care to save the passenger from harm. Nor does the duty of the carrier extend to the imprisonment of the passenger so as to prevent the latter by his recklessness or folly from voluntarily exposing himself to needless peril. Though a pas-

senger, he is nevertheless a free man. Railway coaches are provided with windows to promote the health of passengers by affording light and ventilation, and that the tedium of a journey may be relieved in some degree and its pleasures enhanced by viewing the objects along the route. The place for the passenger is inside, not outside of the coach, and this is known to everybody who ever saw a railway coach. The carrier is no more bound to barricade the windows, to prevent passengers from extending their limbs outside, than he is to lock the doors to prevent them from going from car to car when the train is in motion, and thus voluntarily subjecting themselves to the dangers obviously incident to that act of rashness. The same reason which would require the one thing would also require the other; nay, it is not easy to see why it would not require that a passenger should be so restrained of his liberty in every respect that he could not by any act of his own put himself in unnecessary danger. Such a power in railroad officials must exist, if the duty to exercise it exists. The obligation to answer in damages cannot be separated from the authority to do what is necessary to avoid liability. The law recognizes no such duty as resting upon carriers of passengers, nor have they any authority to exercise such unreasonable and annoying power over those whom they carry. Their passengers are not their slaves, nor are the latter absolved from the duty of using ordinary care for their own safety. Unwarranted, officious, and insulting interference with the liberty of passengers by railroads had proceeded in this state to such a point that the legislature at its last session deemed it necessary to interfere and impose severe penalties to prevent one form of the annoyance: Acts 1867, p. 165.

The proposition put by the court below for the guidance of the jury, that it is the duty of the carrier to barricade coach windows, etc., finds some sanction in *New Jersey R. R. Co. v. Kennard*, 21 Pa. St. 203; but it is so entirely at variance with the weight of authority and with elementary principles that we cannot recognize it as good law. This case has recently been directly condemned and overruled by the same court, in *Pittsburgh etc. R. R. Co. v. McClurg*, 56 Id. 294.

Holbrook v. Utica etc. R. R. Co., 12 N. Y. 236 [64 Am. Dec. 502], is also relied upon by the appellee as sustaining the action of the court; but in our opinion that case is very far from it. There it was a controverted question whether the plaintiff's arm was inside or outside of the car when the in-

jury occurred. The court below had charged the jury that the railroad company only contracted to carry the plaintiff safely, provided she kept within the cars; that it was for the jury to say whether her elbow was out of the cars at the time it was injured, and if it was, then it was a fact from which they might infer want of ordinary care on her part. The defendant had moved the court to instruct that if the jury found that the plaintiff's arm was outside of the window when the injury was received, it was an act of negligence, and she could not recover. The chief question in the appellate court was, whether the refusal of this instruction was error. That it was a correct statement of the law was not questioned in the court of appeals, either in the argument or in the opinion of the court. Indeed, the opinion is quite to the contrary; but there was held to have been no error in its refusal, for the sole reason that the lower court had charged the jury substantially in accordance with the request, and was right in declining to repeat it.

It cannot be necessary to cite authorities in support of the views upon this subject already announced in this opinion. We content ourselves with a reference to *Todd v. Old Colony R. R. Co.*, 3 Allen, 18 [80 Am. Dec. 49], and *Catawissa R. R. Co. v. Armstrong*, 49 Pa. St. 186, for a clear and forcible statement of the law upon the subject, as it has been settled for ages.

The judgment is reversed, with costs, and the cause remanded for a new trial.

BURDEN OF PROOF AS TO CONTRIBUTORY NEGLIGENCE: *Milwaukee etc. R. R. Co. v. Hunter*, 78 Am. Dec. 699, and note 706; *Gahagan v. Boston etc. R. R. Co.*, 79 Id. 724, and note 726.

WHEN CONTRIBUTORY NEGLIGENCE PREVENTS RECOVERY: *Chapman v. New Haven R. R. Co.*, 75 Am. Dec. 344; *Murch v. Concord R. R. Co.*, 61 Id. 631, and note 642; *North Pennsylvania R. R. Co. v. Heilman*, 88 Id. 492; *Warren v. Fitchburg R. R. Co.*, 85 Id. 700, and note 706; *Louisville etc. R. R. Co. v. Collins*, 87 Id. 486.

CARE IMPOSED UPON CARRIERS OF PASSENGERS FOR HIRE: *Warren v. Fitchburg R. R. Co.*, 85 Am. Dec. 700; *Johnson v. Winona etc. R. R. Co.*, 88 Id. 83, and note 88; *State v. Baltimore etc. R. R. Co.*, 87 Id. 600.

ERROR WITHOUT PREJUDICE IS NO GROUND FOR REVERSAL: *Saltonstall v. Riley*, 65 Am. Dec. 334; *Lucas v. New Bedford etc. R. R. Co.*, 66 Id. 406; *Baker v. Haldeman*, 69 Id. 430; *State v. Shippey*, 88 Id. 70; *Tyler v. Green*, 87 Id. 130.

THE PRINCIPAL CASE IS CITED to the point that to entitle the plaintiff to recover in an action for a personal injury, on the ground of negligence, he must have been free from negligence on his part contributing to the injury, in *Bellefontaine R'y Co. v. Hunter*, 33 Ind. 357; *Terre Haute etc. R. R. Co. v. Graham*, 46 Id. 246.

ERWIN v. BULLA.

[29 INDIANA, 95.]

INSPECTION OF PREMISES BY JURY. — STATUTORY REQUIREMENT THAT NO ONE SHALL SPEAK TO JURY ON SUBJECT OF TRIAL should be carefully observed on the inspection by the jury of the property in dispute. And where, in violation of this requirement, a witness for the prevailing party was present and made a remark bearing on the case, which part of the jurors heard, and the verdict seemed to be founded upon a theory suggested by the remark, the judgment was reversed.

THE opinion states the case.

C. H. Burchenal, for the appellants.

J. B. Julian and J. Perry, for the appellee.

By Court, RAY, J. This was an action for unlawfully taking and converting to the use of the appellants the personal property of the appellee.

The subject-matter of the controversy was two heifers, one of which, a roan, the appellee and his witnesses testified had the point of one of her horns broken off while yet a calf. By agreement of the parties, and under the order of the court, the animals were both produced on the public square for an examination by the members of the jury. The court directed that no one should be present at such examination with the jury but the parties and their counsel. Notwithstanding this order of the court, the jury, during the inspection of the cattle, were surrounded by a crowd of witnesses, and "a statement was made by one of the witnesses for the plaintiff, in the hearing of one or more of the jurors, to the effect that one or both of the horns of said roan heifer had been filed or scraped to disguise and conceal the place where the point had been broken." No such evidence had been introduced on the trial, and the defendants' affidavit is filed in support of a motion for a new trial, in denial that any such means had been resorted to, or that the point of either of the horns had been broken. Affidavits of persons of skill in such matters are also filed, showing the impossibility of any such method being successfully used, and from an inspection of the horns, stating that they were both perfect in form.

The finding was for the plaintiff. Section 328 of the code authorizes the jury, under the order of the court and in charge of a sworn officer, to inspect any property in dispute, and provides that while so engaged no one but the person in charge

of them shall speak with them on any subject connected with the trial. It is most important that this requirement should be carefully observed, and as we do not see how the jury could reach the finding rendered, except upon the theory suggested by the plaintiff's witness, we reverse the case, that no advantage may be received from a violation of the order of the court and the requirement of the statute.

The judgment is reversed, with costs, and the cause remanded for a new trial.

MISCONDUCT OF JUROR AS GROUND FOR SETTING ASIDE VERDICT: *Hilton v. Southwick*, 35 Am. Dec. 253, and note 255; *Smith v. Barnes*, 36 Id. 523, note.

NEW TRIAL WILL BE GRANTED where it appears that the defendant and his sons took up their quarters in different houses of entertainment frequented by the jury, paid them unusual civilities, treated them more than once, all of which was done under such circumstances as to render it probable that it was for the purpose of influencing the jury: *Phillipsburgh Bank v. Fulmer*, 86 Am. Dec. 193.

JUROR HAVING KNOWLEDGE OF FACTS NOT IN EVIDENCE has no right to consider them in making up verdict: *Ottawa Gas Light Co. v. Graham*, 81 Am. Dec. 263, and note 266.

INSPECTION BY COURT OR JURY OF PROPERTY OR PLACE IN DISPUTE, OR PREMISES TESTIFIED ABOUT, AND PURPOSE OF SUCH INSPECTION, AND EFFECT TO BE GIVEN IT IN MAKING UP VERDICT. — The practice of permitting the jury to inspect or view premises about which there was a controversy prevailed in England at an early period, and the right of view seems to have existed at common law prior to any statutory enactment upon the subject: See 5 Bac. Abr., tit. Juries. The early statute of 2 Westm., c. 48, made provision for a view, however, in cases where the title to land was drawn in question, and after the cause had been brought on to trial. Provision for views in civil cases was further made by statute 4 Anne, c. 16, sec. 8, which empowered the courts at Westminster to grant a view in the first instance, previous to the trial. This statute was construed as meaning that a view should not be granted unless the court was satisfied that it was proper and necessary: Views in Civil Causes, 1 Burr. 252. And such is the construction given to early statutes on the subject in this country: See *Ostrander v. Kneeland*, 20 Johns. 276; *Vischer v. Conant*, 4 Cow. 396; *Stewart v. Richardson*, 3 Yeates, 89; *Nesbit v. Kerr*, 3 Id. 194; and it was held that the affidavit, on moving for a view, should state the particular circumstances, so as to enable the court to judge whether the view be necessary: *Jackson v. Gauger*, 6 Cow. 578. In England, a view may now be had under the common-law procedure act, 1854, section 58, which provides that "either party shall be at liberty to apply to the court or a judge for a rule or order for the inspection by the jury, or by himself, or by his witnesses, of any real or personal property, the inspection of which may be material to the proper determination of the question in dispute; and it shall be lawful for the court or a judge, if they or he think fit, to make such rule or order upon such terms as to costs and otherwise as such court or judge may direct." As ancillary to the power of inspection given to the courts by this provision is the power to order such things to be done as may be necessary for the inspection: *Bennett v. Griffiths*,

3 El. & E. 471; 8 C., 30 L. J. Q. B. 98. But the courts are strict in guarding against any abuse of the right of view, and great care is observed by them in so framing their rules that no improper influences may be brought to bear upon the jury: See *Stones v. Menham*, 2 Ex. 382.

In this country, as in England, views are now authorized and regulated by statute in the several states. And it has been held that it is not competent for the court to order a view against the objection of a party to a suit, except in cases where such view is authorized by statute: *Dowd v. Guikrie*, 13 Ill. App. 653. In the absence of legislative provisions describing the mode in which jury views are to be conducted, it is held to be more in consonance with the theory and methods of judicial trials that the jury should base their findings solely upon sworn testimony taken in open court, or by depositions taken as provided by law: *Id.*; *Stamposaki v. Steffins*, 79 Ill. 303. The provision on the subject usually found in the American statutes is, that "when, in the opinion of the court, it is proper for the jury to have a view of the property which is the subject of litigation, or of the place in which any material fact occurred, it may order them to be conducted, in a body, under the charge of an officer, to the place, which shall be shown to them by some person appointed by the court for that purpose. While the jury are thus absent, no person other than the person so appointed shall speak to them on any subject connected with the trial": Cal. Code Civ. Proc., sec. 610; Ind. Code Civ. Proc., sec. 381; Iowa Rev. Code 1886, sec. 2790; Ind. Code Civ. Proc., sec. 252; Kan. Code Civ. Proc., sec. 277; Dakota Code Civ. Proc., sec. 250. The Wisconsin statute provides that "the jury may, in any case, at the request of either party, be taken to view the premises or place in question, or any property, matter, or thing relating to the controversy between the parties, when it shall appear to the court that such view is necessary to a just decision": Wis. Rev. Stats., sec. 2852; provided the party making the motion shall advance a sufficient sum to defray the expenses of a view: *Id.* And see Me. Rev. Stats. 1883, c. 104, sec. 41. Whether a view should be granted or not in a given case, under the above provisions, is purely a matter in the discretion of the trial court, and its determination on that point will not be reviewed on appeal: *Kansas Central R. R. Co. v. Allen*, 22 Kan. 285; *Pick v. Hydraulic Co.*, 27 Wis. 433; *Boardman v. Westchester Fire Ins. Co.*, 54 Id. 364; *Snow v. Boston etc. R. R.*, 65 Me. 230; *Chute v. State*, 19 Minn. 271, 278.

A view is a proper subject of a motion: See *Jackson v. Gauger*, 6 Cow. 578; but if it be obtained without a motion, it is held that the court will not set aside the proceedings, when it appears that the opposite party has united or participated therein without objection: *Brown v. O'Brien*, 3 Pa. L. J. 115. But the courts are strict in guarding against abuse of the right of view, especially in criminal cases. And when, under the provisions of the statute, a jury is permitted by the court to view the place where an offense is charged to have been committed, or in which any other material fact occurred, no person can be allowed, even by the court, to speak to the jury on any subject connected with the trial: *People v. Green*, 53 Cal. 60. The jury go out for the single purpose of viewing the place, and not for the purpose of hearing any oral explanations or comments, even from the person appointed by the court to show it to them: *State v. Lopez*, 15 Nev. 407; and see Nev. Code Civ. Proc., sec. 378; Cal. Pen. Code, sec. 1119. A view is allowed, not for the purpose of furnishing evidence upon which a verdict is to be found, but to enable the jury better to understand and apply the evidence which is given in court: *Chute v. State*, 19 Minn. 271.

Both parties are entitled to be present on a view. And their presence is said to be a prerequisite to the validity of the procedure: See Whart. Cr. Ev., sec. 312. And it is held that if, during the progress of a criminal trial, a view of the locality where the crime is alleged to have been committed is ordered by the court, the defendant must be permitted to accompany the jury, or otherwise the verdict may be set aside: *Benton v. State*, 30 Ark. 328; *Eastwood v. People*, 3 Park. Cr. 25; *Smith v. State*, 42 Tex. 444; *State v. Bertin*, 24 La. Ann. 46; but the contrary was held where the defendant neither made objection nor asked permission to accompany the jury at the time: *People v. Bonney*, 19 Cal. 428, 446; *State v. Adams*, 20 Kan. 311; *State v. Ah Lee*, 8 Or. 224.

It is an established principle that jurors should decide cases upon such evidence as is produced before them by the parties to the litigation; and they cannot go in search of evidence privately, or act upon evidence thus obtained: *Winslow v. Morrill*, 68 Me. 362. And where jurors, pending a trial, go with the witnesses of one of the parties, without the direction or consent of the court, or the knowledge of the other party, for the purpose of having the premises shown or the evidence explained by these witnesses *ex parte*, it is such misconduct in the jurors as will set aside the verdict: *Deacon v. Shreve*, 22 N. J. L. 176; and to the same effect, see *Ortman v. Union Pac. R'y Co.*, 32 Kan. 419; *Bowler v. Washington*, 92 Me. 302. So where one of the questions before the jury was whether certain furniture was made in a workman-like manner, a juror during the trial visited the place where the furniture was stored, and examined it. And it was held that such conduct was irregular and unlawful, and sufficient to vitiate the verdict: *Stampofski v. Steffins*, 79 Ill. 303. So where the court announced that the jury would be sent to make a view, if both or either parties would pay the expenses, and the plaintiff refused and objected to the view, but the defendants consented, and the jury accordingly proceeded to the place, and were dined by the defendants, — held, that it would be a reproach on the administration of the law to suffer a verdict obtained under such circumstances to stand: *Doud v. Guthrie*, 13 Ill. App. 653. But the mere fact that the defendant and counsel on both sides of the case rode in the same vehicle with the jury on their return from viewing the *locus in quo*, the plaintiff not objecting at the time, cannot be urged as a ground for setting aside the verdict: *Hahn v. Miller*, 60 Iowa, 96; and see *Johnson v. Greim*, 17 Neb. 447. So the bare fact that a juror during the trial visited the premises where it was alleged the defendant had committed a burglary, was held to be insufficient ground for discharging the jury: *People v. Hope*, 62 Cal. 291.

Jurors are not authorized to view any other property than that which is in litigation, and which they are directed by the court to view: *Wright v. Carpenter*, 50 Cal. 556. But when by consent of parties jurors have been allowed to view the property claimed to be that in litigation, it is not such misconduct as will support a motion for a new trial if the jurors look at the property a second time, when neither the parties nor their counsel are present, and no consent of the parties is given for them to do so: *Trafton v. Pitts*, 73 Me. 408.

PURPOSE AND INTENT OF INSPECTION are, to enable the jury the more clearly to understand and apply the evidence disclosed on the trial, and not to base their verdict in any degree upon such inspection itself, nor to convert them into silent witnesses in relation to which neither party has an opportunity to cross-examine: *Cloose v. Samm*, 27 Iowa, 503; *Wright v. Carpenter*, 49 Cal. 607; and see *Chute v. State*, 19 Minn. 271; *Deacon v. Shreve*, 22 N. J. L. 176; *City of Indianapolis v. Scott*, 72 Ind. 196, 205; *Doud v. Guthrie*, 13 Ill.

App. 653. And the impression made upon the minds of the jurors by an inspection does not constitute a part of the evidence in the cause, and cannot be considered by them in making up their verdict: *Heady v. Vevay etc. Turnpike Co.*, 52 Ind. 117; *Wright v. Carpenter*, 49 Cal. 607. Nor can such evidence be incorporated into a bill of exceptions, or be made a part of the record: *Doud v. Guthrie*, 13 Ill. App. 653, 660. A bill of exceptions may contain all the evidence, although it appears that the jury were allowed to inspect the place where the matters referred to in the pleadings occurred: *Gagg v. Vetter*, 41 Ind. 228, 258; *Jeffersonville etc. R. R. Co. v. Bowen*, 40 Id. 545, overruling *Evansville etc. R. R. Co. v. Cochran*, 10 Id. 560.

MUCKENBURG v. HOLLER.

[29 INDIANA, 139.]

WRITTEN AGREEMENT BETWEEN HUSBAND AND WIFE, MADE PENDING HER APPLICATION FOR DIVORCE, that when the divorce should be granted she would pay him a certain sum for improvements made by him on her lands during marriage, is against public policy and void.

ALIMONY IS INCIDENT TO SUIT FOR DIVORCE; and in adjusting alimony, all matters of property between the parties are to be considered, and the legal inference is, that they were considered and settled in the divorce suit.

THE opinion states the case.

F. Rand and R. H. Hall, for the appellant.

J. A. Beal and J. Milner, for the appellee.

By Court, FRAZER, C. J. The appellee was the plaintiff below. The complaint was in two paragraphs; but inasmuch as the finding and judgment against the appellant were entirely upon the second paragraph, no very particular notice need be taken of the first, or the pleadings thereto, or the rulings of the court thereon; for whatever errors intervened in that regard could not possibly have injured the appellant.

The second paragraph of the complaint avers that while the appellant and the appellee were husband and wife, lawfully married and cohabiting, he, at her request, erected upon a lot in Indianapolis, owned in fee by her and her two children by a former marriage, a dwelling-house worth seven hundred dollars, upon an agreement between them that he should take the rents and profits until reimbursed for his expenditure; that he never received any such rents; that afterwards, on the 14th of February, 1863, they were divorced; that before the divorce it was agreed between them, as a compromise, that he should relinquish his right to the rents and profits, and that

she should pay him two hundred dollars, with interest, one day after a divorce should be granted between them, and she thereupon executed her written contract to that effect, and that she fails and refuses to pay. It is assigned for error that the court below overruled a demurrer to this paragraph.

The special contract for the payment of two hundred dollars was contrary to the policy of the law. It was so framed as to have effect only on condition that a divorce should be granted. Its direct tendency was to interest the present plaintiff in procuring a divorce, or in foregoing resistance to an effort by his wife directed to that end. The marriage relation is not thus to be tampered with, and the courts, by contract of the parties, converted into mere registers of their agreements for separation from the bonds of matrimony. The law favors marriage, and cannot therefore sanction contracts intended to promote its dissolution by lending itself to their enforcement. We know of no case in the books in which such an appeal to any court to compel the fulfillment of such a contract, or to award damages for its breach, has been successfully made: *Stoutenburg v. Lybrand*, 13 Ohio St. 228; *Goodwin v. Goodwin*, 4 Day, 343; *Weeks v. Hill*, 38 N. H. 199; *Sayles v. Sayles*, 21 Id. 312 [53 Am. Dec. 208]. That contract being thus out of the way, it remains to consider whether the other facts averred were sufficient.

Liabilities between husband and wife, arising out of express contract between them, as well as out of implied trusts, are sometimes recognized and enforced by courts exercising chancery powers. In such cases, remedy is given during the existence of the marriage. We know, however, of no authority for such proceedings, upon an express contract, after a divorce *a vinculo matrimonii*. Alimony is an incident of a suit for divorce, without any prayer for it, and in this state it is not a matter which can constitute the subject of an independent suit. It must be adjudged in the divorce case, or not at all. In determining the alimony to be allowed, it has long been the practice of our courts, and indeed it seems to be absolutely necessary to an intelligent and fair administration of justice, to hear evidence concerning all matters of property which have transpired between the parties, and adjust the alimony as may be deemed right under all the circumstances of each particular case. All questions of property between the parties, like that in controversy here, are thus in litigation in a suit for divorce, and must there be settled. The

complaint here shows that the parties have been divorced. It shows, therefore, by legal inference, that the subject-matter of this suit was there settled and put at rest.

The first paragraph of the complaint differed from the second only in the fact that it did not allege the special agreement to pay two hundred dollars upon the entry of a decree for divorce. Both paragraphs must stand or fall together; and we are of opinion that the demurrer to each was well taken.

The judgment is reversed, with costs.

AGREEMENT TO WITHDRAW OPPOSITION TO DIVORCE PROCEEDINGS cannot form a valid consideration for a promissory note, and the note is void: *Sayles v. Sayles*, 53 Am. Dec. 208, and see note 212.

INCIDENTAL POWER OF COURT TO GRANT TEMPORARY ALIMONY: See *Methwin v. Methwin*, 60 Am. Dec. 664, and note 665.

THE PRINCIPAL CASE IS CITED to the point that an agreement that a defendant in a divorce suit will not make any defense is void as against public policy, and a note executed upon such a consideration cannot be enforced against the maker, in *Everhart v. Tuckett*, 73 Ind. 409.

HARDY v. BLAZER.

[29 INDIANA, 226.]

WHERE PURCHASER OF WAREHOUSE AND GRAIN AGREES TO ASSUME ALL CONTRACTS OF VENDOR growing out of the business, an action will lie against him on a receipt previously given by the vendor for grain, stipulating that the grain should be delivered on demand or the money paid; but the vendor should be joined as a party defendant.

The opinion states the case.

H. Craven, W. R. Pierse, and H. D. Thompson, for the appellants.

J. Davis and E. B. Goodykoontz, for the appellee.

By Court, RAY, J. The appellee charged in his complaint that the firm of Sutton and Swan, who were, on the twenty-ninth day of August, 1864, engaged in the warehouse, storage, and wheat trade, executed to the appellee a receipt for certain wheat, then received by them in store, subject to the order of the appellee, and to be paid for by said firm at the market price. That the appellants, together with another person, who has not joined in this appeal, subsequently purchased from said firm their warehouse and the wheat then in store, and as

part of the consideration of said purchase, contracted to redeem all the outstanding receipts, and fulfill all contracts made by said firm; that the appellee had duly demanded from the appellants the wheat mentioned in said receipt, and upon refusal to deliver the same, had demanded the market price for the wheat, wherefore he prayed judgment, etc. A demurrer was filed, on the ground that sufficient facts were not stated in the complaint to entitle the appellee to a judgment against the appellants. This demurrer was overruled. We think this ruling fully sustained by authority. In *Ellwood v. Monk*, 5 Wend. 235, the defendant, Jacob Monk, in consideration of property delivered to him by Johannes Monk, undertook and promised to pay and discharge, among the claims of other creditors, the demand and claim of the said Ellwood against the said Johannes. In that case the claim was specified. We do not see that it was material, however, that such should have been the case, unless there had been some false or fraudulent representations. The action was sustained. The same rule was followed in *Delaware and Hudson Canal Co. v. Westchester County Bank*, 4 Denio, 97.

In the case of *Beers v. Robinson*, 9 Pa. St. 229, the plaintiff was a creditor of Keenan, and proved that Keenan's property was sold at auction, and the notes given by the purchasers given to the defendant, who promised Keenan that he would pay his debts so far as the notes and the property purchased by the defendant would go. It was held that the creditor could maintain an action on the promise. This case is in point, as the special debt was not named. The following cases are also to the same effect: *Arnold v. Lyman*, 17 Mass. 400 [9 Am. Dec. 154]; *Fitch v. Chandler*, 4 Cush. 254; *Hall v. Marston*, 17 Mass. 575; *Felch v. Taylor*, 13 Pick. 133; *Carnegie v. Morrison*, 2 Met. 381; *Hinkley v. Fowler*, 15 Me. 285. An interesting review and classification of the authorities will be found in the case of *Mellen v. Whipple*, 1 Gray, 317. In *Eastwood v. Kenyon*, 11 Adol. & E. 438, S. C., 39 Eng. Com. L. 137, it was held that the fourth section of the statute of frauds contemplated only cases where the promise is made to the person to whom another is liable; therefore a promise by the defendant to the plaintiff to pay the plaintiff's debt due to another is not within the statute.

A demurrer was also filed to the complaint, on the ground that there was a defect of parties defendant. This was also overruled. We cannot sustain this action of the court. Our

code provides that any one may be made a defendant to the action who is a necessary party to a complete determination or settlement of the question involved. We think the defendants, for their own protection, could insist upon the members of the firm of Sutton and Swan being joined in the suit and bound by the judgment. The demurrer for this cause should have been sustained.

The judgment is reversed, with costs, and the cause remanded for further proceedings.

PARTY FOR WHOM BENEFIT PROMISE IS MADE MAY MAINTAIN ACTION THEREON: *Brown v. O'Brien*, 44 Am. Dec. 254; *Machias Hotel Co. v. Coyle*, 58 Id. 712; *Barker v. Bucklin*, 43 Id. 726, and note 739.

ASSUMPSIT IS PROPER REMEDY TO RECOVER ON CONTRACTS OF THIRD PERSONS: *Ross v. Milne*, 37 Am. Dec. 646; and see *Reeside v. Reeside*, 88 Id. 503.

LIABILITY OF GRANTEE OF MORTGAGED PREMISES WHO ASSUMES PAYMENT OF MORTGAGE: *Burr v. Beers*, 80 Am. Dec. 327, and note 329.

THE PRINCIPAL CASE IS CITED in support of the rule that a party not known as a contracting party, but for whose benefit the contract was made, may maintain an action thereon, in *Haggerty v. Johnston*, 48 Ind. 44; *South Side Planing Mill Assoc. v. Outler etc. Lumber Co.*, 64 Id. 566; and is cited to the point that in a suit on a joint contract, all the makers thereof must be joined as parties defendant, in *Blodges v. Irwin*, 35 Ind. 294.

CASES
IN THE
SUPREME COURT
OF
IOWA.

PURSLEY v. HAYES.

[22 IOWA, 11.]

VERDICT AGAINST EVIDENCE SHOULD BE INSTANTLY SET ASIDE.

INVALID DEED OF MARRIED WOMAN MAY BE MADE EFFECTUAL BY REDelivery AFTER DISCOVERY, where she has joined with her husband in the deed during coverture, but under circumstances rendering it invalid, as where it is defectively acknowledged, and has been delivered with this defect.

TO SUPPORT DEED, IT IS NOT NECESSARY THAT CONSIDERATION SHOULD MOVE TO GRANTOR. If paid to another, it is just as effectual, and especially when thus paid at the instance of the grantor.

VALIDITY OF CONVEYANCE BY WIFE AFTER HUSBAND'S DEATH, WHERE CONSIDERATION HAD MOVED TO HIM. — Where a wife with her husband agrees to sell him her interest in certain real estate, and the husband at the time executes and acknowledges a deed for the premises, but does not deliver it, and his wife, not being present, fails to join therein, and the husband dies soon thereafter, and the widow shortly after his death duly executes and acknowledges the deed, which is then delivered to the purchaser, the payment of the consideration to the husband, with the knowledge and consent of the wife, and her voluntary execution and delivery of the deed after becoming discover, has the effect of divesting her of title.

EVIDENCE. — WHERE DEFENDANT INTRODUCES DEEDS MADE BY GUARDIAN WITHOUT ANY EVIDENCE SHOWING HIS AUTHORITY TO CONVEY, and the plaintiff afterwards offers to introduce all the records upon which the authority to sell was based, and the consideration of the points made on the record necessarily involves most if not all of those made against the introduction of the deeds, and the records are all embodied in the bill of exceptions, it becomes immaterial to consider whether the court did or did not err in admitting the deeds without preliminary proof, because if the records render defendant's title invalid, plaintiff's rights are equally protected as though the deeds had been rejected until such proof was made.

IOWA CASES GROUPED AND CITED SHOWING RESPECTIVE RIGHTS AND OBLIGATIONS OF HEIRS AND PURCHASERS.

SECTION 1508, CODE OF 1851, IOWA REVISION, SECTION 2560, WHICH PROVIDES THAT NO PERSON can question the validity of a guardian's sale of real estate after the lapse of five years from the time it was made, is not confined in its application to cases of appeal, writs of error, or other process bringing up the matter for review before an appellate court, but extends to proceedings questioning the validity of such sale other than by appeal, writ of error, etc. This statutory provision was not intended to cover sales made by a person having no semblance of authority, or where the county court had no jurisdiction of the parties or subject-matter, and no possession was taken by the purchaser. In such cases, the heir would not be estopped by the statute from questioning the validity of the sale, though after the expiration of five years.

OBJECTIONS NOT JURISDICTIONAL IN THEIR CHARACTER, BUT RELATING RATHER TO REGULARITY OF PROCEEDINGS, cannot invalidate a title derived through a guardian's sale and deed when raised in a collateral proceeding, and especially when made for the first time after five years from the date of the sale, and where the purchaser took and held possession thereunder.

JUDGMENTS AND PROCEEDINGS MAY BE ATTACKED COLLATERALLY WHERE THERE WAS NO JURISDICTION over the parties and subject-matter, because such proceedings are void; but proceedings merely voidable cannot be thus attacked.

GUARDIAN'S BOND MADE PAYABLE TO COUNTY, INSTEAD OF TO PARTIES INTERESTED, IS NOT THEREBY VITIATED, under the Iowa statutes, but inures to the benefit of the latter; and suit may be brought thereon in the name of any one thus secured who has sustained any injury by a breach thereof. Nor will the fact that the bond is thus made payable, or the failure of the county judge to enter its approval of record, invalidate the title derived from the guardian's sale. Such defects are not jurisdictional.

WANT OF SUFFICIENT CAPTION TO COUNTY COURT RECORD WILL NOT INVALIDATE TITLE derived through guardian's sale and deed.

ONE GUARDIAN MAY BE APPOINTED FOR SEVERAL WARDS, JOINTLY, AND JOINT BOND MAY BE GIVEN for their security, where the wards hold by common title and as tenants in common.

FAILURE OF GUARDIAN TO DO HIS DUTY IN KEEPING HIS ACCOUNT WITH SEVERAL WARDS separate and distinct will not invalidate a title under a sale made by him.

DISCREPANCY BETWEEN PETITION FOR SALE OF WARDS' ESTATE AND NOTICE, EFFECT OF. — Where a guardian, in a proceeding to sell the real estate of his wards, has notice directed to the wards, naming each of them, and it is thus served, while the petition only describes them as "the minor children of Hugh Pursley, deceased," this is not a jurisdictional defect that can be urged in a collateral proceeding to defeat the title of the purchaser at the guardian's sale, especially where it appears as a matter of fact that the heirs named in the notice are the only minor heirs, and the whole record shows that they were sufficiently named and described. In an original action, however, in the county court, a petition against the "minor heirs of Hugh Pursley, deceased," without more, and a notice in the same form, would doubtless be ineffectual to confer jurisdiction.

RECORDS OF COUNTY COURT, THOUGH INFERIOR TRIBUNAL, NEED NOT RECITE IN DETAIL FACTS upon which the ultimate and essential conclusion as to jurisdiction was based, where a guardian's petition to sell the real estate of his wards alleged the requisite jurisdictional facts.

COUNTY COURT, IN IOWA, IS ONE OF LIMITED AND INFERIOR JURISDICTION; BUT, LIKE ONE OF GENERAL JURISDICTION, EVERY INTENDMENT WILL BE INDULGED in favor of its acts, when acting within the scope of its power. Where its jurisdiction has once attached, the presumption obtains in favor of all the subsequent proceedings; and mere irregularities or defects will not avail in a collateral proceeding. If its power to decide is shown, it cannot be lost or taken away because erroneously exercised.

ERRORS, IRREGULARITIES, AND MERE DEFECTS ARE ABSOLUTELY CONCLUSIVE IN COLLATERAL PROCEEDINGS, whether the court making them is one of limited and inferior or general and superior jurisdiction.

JUDGMENT OF COURT HAVING JURISDICTION OF PARTIES AND SUBJECT-MATTER IS CONCLUSIVE, in absence of fraud, and cannot be impeached collaterally.

INTERESTS OF INFANTS AND PURCHASERS ALIKE REQUIRE THAT GUARDIANS' SALES OF REAL ESTATE belonging to minors should not be held invalid for every departure from some directory provision of the statute, or for every error of decision in courts ordering these sales.

IOWA CODE OF 1851, SECTION 1721, CHAPTER 133, ONLY REQUIRED THAT MINORS SHOULD BE PERSONALLY SERVED in a guardian's proceeding to sell the real estate of his wards; and it was unnecessary that a copy of the petition and notice should be left with the minors unless demanded; so in a collateral proceeding to impeach the validity of a guardian's sale made several years before, where the application and notice, with the return of the officer indorsed thereon, were found attached, it was held to be fairly inferable that they were treated as constituting one paper, and so served and covered by the return of the officer.

COURTS WILL NOT PRESUME THAT OFFICER IN SERVICE OF PROCESS FAILED TO DISCHARGE HIS DUTY, or infer facts inconsistent with his return in order to divest rights acquired under it, or to defeat the judgment of a court of competent jurisdiction.

CODE OF IOWA, SECTION 2512, DECLARES THAT PROCEEDINGS OF ALL COURTS OF LIMITED AND INFERIOR JURISDICTION, like those of general and superior jurisdiction, shall be presumed regular, except in regard to matters required to be entered of record, and except when otherwise expressly declared.

NO STATUTE OF IOWA REQUIRES RETURN OF SERVICE TO BE ENTERED OF RECORD in proceedings by a guardian to sell the real estate of his wards, nor in such cases that the judgment must recite that due service was made; and there is no statute expressly excepting county courts in proceedings of this character from the operation of the general rule that the proceedings of all courts are to be presumed regular.

COLLATERAL ATTACK FOR DEFECTIVE SERVICE.—In a guardian's proceeding to sell the real estate of his wards, where there was a notice and return of personal service on the minors, a defect in it, which the original tribunal before which the return was made held and treated as immaterial, cannot under the statutes and decisions of Iowa avail in a collateral proceeding to defeat the title of the purchaser acquired

through the guardian's sale and deed, especially where the insufficiency of the return is attacked after a lapse of five years.

DISTINCTION BETWEEN EFFECT OF DEFECTIVE SERVICE AND OF NO SERVICE SHOULD BE OBSERVED.

GRANT OF LAND SO DESCRIBED IN CONVEYANCE AS TO RENDER ITS IDENTITY WHOLLY UNCERTAIN IS VOID.

GRANT OF LAND IS NOT VOID FOR UNCERTAINTY, if the court can imagine testimony which would show any particular monument to be that which is called for in the grant. A deed is not void for uncertainty of description if it can be made good by any construction.

EITHER WRITTEN OR PAROL EVIDENCE MAY BE ADMITTED TO APPLY INSTRUMENT TO SUBJECT-MATTER.

LAND INCLUDED IN GUARDIAN'S DEED IS SUFFICIENTLY DESCRIBED where, prior to the proceedings to sell, it had been surveyed and platted into lots, numbered from 1 to 7, and a copy of the plat was made a part of the record in the case; and where one of the deeds describes, by metes and bounds, one and one quarter acres of one of these lots, and refers to the lot as "lot 1 in the survey of said land, being a part of the southeast quarter, section 5, township 78, range 24 west, 5 P. M."; and the other deed refers to the same survey by its date, and conveys all of said lot 1, after excepting, by metes and bounds, the parcel previously conveyed.

THIS case was before this court at the December term, 1864, upon plaintiffs' demurrer to one division of defendants' answer: See *Pursley v. Hayes*, 17 Iowa, 310. The order of the court below overruling the demurrer was affirmed, and the case was afterwards tried on its merits. At the June term, 1865, an opinion was announced adverse to the appellants, plaintiffs below, and upon their application a rehearing was granted. The various questions raised on the trial, some new questions, and the facts of the case appear in the opinion.

B. N. Kinyon and Thomas F. Withrow, for the appellants.

C. C. Nourse, for the appellees.

By Court, **WRIGHT, J.** This controversy relates to 133 acres of land, within the corporation limits of the city of Des Moines, many parts of it now covered with costly and valuable improvements. It once belonged to Hugh Pursley, deceased. Plaintiffs are his heirs (children), and are entitled to recover, unless their title has been divested by certain conveyances made by one of them in person, and by the other through their alleged guardian, John C. Jones. So that we may confine our examination to these alleged conveyances and their effect upon plaintiffs' title.

The deed made by one of the heirs (Mrs. Deford, formerly Mrs. Carr), as the questions made upon it have no kind of

connection with the other parts of the case, may be considered by itself, and will first receive attention.

She was married to Carr March 11, 1848; was twenty-one years of age August 12, 1851; her father died April 23, 1850, and her husband December 23d of the same year. In November, 1850, she with her husband agreed with her uncle (West) to sell to him her interest in the real estate in controversy, with other tracts, for about three hundred dollars, to be paid in horses, a wagon, and some other property. They then resided in Dallas County, and it was then agreed that the husband should come to Des Moines, get the property, sign the deed, and that the wife would do so the first time she was down. He signed and acknowledged the deed, obtained the property, a part of it was left at his death, which the wife took into her possession, and disposed of for the use of herself and family.

On the 21st of July, 1851, she signed and acknowledged the deed, and it was then delivered to the grantee and duly recorded.

There was some effort to show that she executed the deed under duress, or that West was guilty of fraud in obtaining her signature.

The testimony, however, most signally fails to establish either claim. There was apparently the utmost fairness, the most perfect honesty, throughout the entire transaction. A verdict in her favor upon this ground should have been instantly set aside as against evidence.

The argument, as we understand it, however, upon which her counsel rely, is this: Carr conveyed his interest and received the consideration. This was effectual to pass his interest, and no more. The wife was not bound by any agreement with the husband during coverture, either to sell or execute the deed; there was no consideration passed to her as a *feme sole*, nothing to give the deed, as to her, validity; and it was therefore void. It is further insisted that the instrument was either the deed of Carr and wife, or her deed as a *feme sole*; if the former, it is defectively acknowledged; if the latter, it is not supported by a consideration; that there was no new contract, no new delivery as her deed.

Thus somewhat at length we have stated, as we believe fairly, the substance of appellants' position.

Treated as the deed of a *feme covert*, it is conceded that the acknowledgment is defective. The deed had never been de-

livered as the deed of Carr and wife, or either or both of them, at the time she signed and acknowledged it. At this time she was a *feme sole*, and as such the acknowledgment is sufficient; and it was then for the first time delivered. What, then, is there to impair or affect its validity? There was no consideration, it is said. Suppose she had agreed during coverture to convey upon the payment of so much money, and the money had been paid to the husband. After his death, in accordance with her agreement (existing in parol), she does convey. Could she be heard to assert the want of consideration? In such a case she but executes her agreement, and the payment to the husband (and especially when made with her knowledge and consent) is a payment to her, and the consideration becomes effectual. It is not as though she had undertaken during coverture to convey jointly with her husband, the acknowledgment being defective; for then her rights are saved, not because of the want of consideration, but because the formalities required by law, and the observance of which were essential to bind her as a *feme covert*, were neglected. Nor is it like the case of *Miller v. Wetherby*, 12 Iowa, 415, where, under the statute of 1843, c. 54, sec. 24, the conveyance of the wife of her own land during coverture was held invalid, because the husband did not join in the conveyance. Then again the law required the conveyance to be made in a certain manner, and because it was not complied with, the title failed.

If the wife had joined with the husband at the time he signed the deed, and had duly acknowledged the same, there could be no question as to its validity, though the entire consideration passed into his hands or under his control. Now, as there was no delivery of the deed when executed by the husband and when he received the consideration, but as she did, after she became discover, duly acknowledge and then deliver the same, the title, in our judgment, as effectually passed as though she had properly joined with her husband during coverture. There can be no doubt of this proposition: If she had joined in the deed during coverture, but under such circumstances as rendered it invalid (because defectively acknowledged, for instance), and the deed had been delivered, she could have made it effectual by redelivery after she became discover. This doctrine is expressly asserted in the authorities most confidently relied upon by the appellants' counsel: *Miller v. Shackelford*, 3 Dana, 289; Perkins's Treatise,

154; and of its correctness there can be no doubt. The redelivery being shown in such cases, there remains no question as to the state of the title; and if, instead of a redelivery, the wife, after she becomes a *feme sole*, for the first time undertakes to and does actually execute and deliver the deed, the case is still stronger in favor of the grantee. Upon this subject generally, see *Hill v. West*, 8 Ohio, 222 [31 Am. Dec. 442]; *Goodright v. Straphan*, Cowp. 201; *Duncan v. Hodges*, 4 McCord, 239 [17 Am. Dec. 734]; *Hudson v. Revett*, 5 Bing. 388; *Grout v. Townsend*, 2 Hill (N. Y.), 554; *Waring v. Smyth*, 2 Barb. Ch. 119 [47 Am. Dec. 299]; *Ellison v. Ellison*, 6 Ves. 662; *Jackson v. Bull*, 1 Johns. Cas. 90; *Bunn v. Winthrop*, 1 Johns. Ch. 329; *Doe v. Howland*, 8 Cow. 277 [18 Am. Dec. 445]. To support a contract (and especially a deed), it is not necessary that the consideration should move to the grantor or promisor. If paid to another, it is just as effectual, and especially when thus paid at the instance of the grantor; and therefore, without stopping to inquire whether this deed would not be good as between the parties, and conclusively so, though there was no consideration (it was made before the taking effect of the code of 1851), waiving all questions under the statute of limitations, passing also the effect of the use and possession by the wife of the property received for the land after the husband's death, not as administratrix, but apparently in her own right, as also the point that defendants took title without knowledge of such alleged want of consideration,—we say without giving weight to any of these considerations, we unite in the opinion that the payment of the consideration to the husband with the knowledge and consent of the wife, and her voluntary execution and delivery of the deed after becoming discoverd, had the effect of divesting her title, and that to this extent the judgment below was right.

Turn we now to the other and more important branch of the case. Besides Mrs. Deford, Hugh Pursley left seven children him surviving, and all minors, their names being Jacob, William, Eliza, Rachel, Elizabeth, Armanda, and Mary. This action was commenced in July, 1863, the said Armanda and Mary still being minors, but attaining their majority before the trial thereof, in February, 1865. It is claimed that John C. Jones was on the 7th of June, 1852, appointed by the county court of Polk County guardian of the estate of said minor children; and that after due application and under an order of said court, he sold the real estate in controversy at public

outcry to certain parties, under whom defendants claim, in September, 1852.

Defendants introduced the deeds made by the guardian, with the approval of the county judge indorsed thereon, omitting any reference or evidence, documentary or otherwise, showing the authority to thus convey, and with some other testimony as to possession, and the like, not necessary now to mention, rested their case. To the introduction of the deeds, plaintiffs, at the time, objected upon various grounds; but the objections were overruled, and the deeds admitted. As plaintiffs afterward offered to introduce all the records upon which the authority to sell was based, and as the consideration of the points made thereon necessarily involve most if not all of those made against the introduction of the deeds, brevity will be consulted by turning our attention to these records and those alleged defects. For it will be seen at once, if in view of these records (all embodied in the bill of exceptions) plaintiffs cannot now successfully impeach the sale, it becomes immaterial to consider whether the court did or did not err in admitting the deeds without preliminary proof. And if these records are in such a condition as to render invalid defendants' title, plaintiffs' rights are equally protected as though the deeds had been rejected until such proof was made.

It is idle—indeed, it is a misuse of terms—to insist that the sale by the guardian was “no sale.” He did sell the property; he did sell as guardian, at least, under a semblance of authority; and it is not like the act of a mere volunteer selling without right, without an order, and without any effort or pretense of effort to obtain authority therefor. He did undertake to comply with the requirements of the law, and he was acting under the direction and control of a court to which the cognizance of such matters is intrusted by the statute. And it will therefore be seen at once that the questions involved cannot be very unlike those heretofore frequently passed upon by this court. And as counsel have referred to them, commented upon them, and in some instances, indirectly if not directly, challenged their correctness, and as we may have occasion to refer in the course of this opinion to the principles recognized by them, we here group and cite most if not all those in this state bearing upon the many points made. And we do this the more unhesitatingly as we desire, if possible, to so dispose of the objections made as that heirs and purchasers may the more certainly know their respective rights and obligations.

In the following cases, the property was sold by the administrator, and the questions arose in a collateral proceeding: *Morrow v. Weed*, 4 Iowa, 77 [66 Am. Dec. 122]; *Long v. Burnett*, 13 Id. 28 [81 Am. Dec. 420].

And in the following the proceedings were direct to set aside sales made by administrators: *Little v. Sinnett*, 7 Iowa, 324; *Van Horn v. Ford*, 16 Id. 578; *Thornton v. Mulquinne*, 12 Id. 549 [79 Am. Dec. 548].

Cases under guardian's sale, where the question arose collaterally: *Frazier v. Steenrod*, 7 Iowa, 339; *Cooper v. Sunderland*, 3 Id. 114 [66 Am. Dec. 52].

Where the proceeding was direct: *Wade v. Carpenter*, 4 Iowa, 361.

Sales by sheriff and trustees collaterally attacked: *Bosworth v. Farenholz*, 3 Iowa, 84; *Cavender v. Smith*, 1 Id. 306; S. C., 5 Id. 157; *Rowan v. Lamb*, 4 G. Greene, 468; *Shaffer v. Bolander*, 4 Id. 201; *Johnson v. Carson*, 3 Id. 499; *Sprott v. Reid*, 3 Id. 489 [56 Am. Dec. 549]; *Burton v. Emerson*, 4 Id. 393; *Hopping v. Burnam*, 2 Id. 39; *Corriell v. Doolittle*, 2 Id. 385; *Seely v. Ried*, 3 Id. 374; *Humphry v. Beeson*, 1 Id. 199; *Thatcher v. Haun*, 12 Iowa, 303; *Dutton v. Cotton*, 10 Id. 408; *Bank of Old Dominion v. Dubuque etc. R. R. Co.*, 8 Id. 277 [74 Am. Dec. 302].

When the attack was direct: *Leffler v. Armstrong*, 4 Iowa, 482 [68 Am. Dec. 672]; *Bridgman v. Wilcut*, 4 G. Greene, 563; *Coriell v. Ham*, 4 Id. 455 [61 Am. Dec. 134]; *Cole v. Porter*, 4 Id. 510; *Ralston v. Lahee*, 8 Iowa, 17 [74 Am. Dec. 291]; *Grapengether v. Fejervary*, 9 Id. 163 [74 Am. Dec. 336]; *Singleton v. Scott*, 11 Id. 589; *Boyd v. Ellis*, 11 Id. 97; *Sypher v. McHenry*, 18 Id. 233; *Penny v. Cook*, 19 Id. 538; *Langworthy v. Campbell*, 19 Id. 568; *Lowe v. Grinnan*, 19 Id. 192; *Boker v. Chapline*, 12 Id. 204; *Sears v. Livermore*, 17 Id. 297; *Hodson v. Tibbetts*, 16 Id. 97.

Sale for delinquent taxes direct: *McGahan v. Carr*, 6 Iowa, 331 [71 Am. Dec. 421].

Collateral: *Scott v. Babcock*, 3 G. Greene, 133; *Laraby v. Reid*, 3 Id. 419; *Gaylord v. Scarff*, 6 Iowa, 179; *Bleidorn v. Abel*, 6 Id. 5; *Rayburn v. Kuhl*, 10 Id. 92; *Abell v. Cross*, 17 Id. 171; *Allen v. Armstrong*, 16 Id. 508; *Boardman v. Bourne*, 20 Id. 134.

There are still other cases, such as *Broghill v. Lash*, 3 G. Greene, 357; *Carr v. Kopp*, 3 Iowa, 80; *Wheeler v. Edinger*, 11 Id. 409; and *Bristow v. Guess*, 12 Id. 404, — where, upon appeal,

it was objected that there had been no sufficient service; and still others, like *Gladson v. Whitney*, 9 Id. 267, and *Smiths v. Dubuque Co.*, 1 Id. 492, where the objections related to the jurisdiction growing out of the subject-matter of the litigation, which in their reasoning are somewhat applicable to the present discussion. But those before cited, with the numerous authorities therein referred to, cover the whole ground, and those of the latter class need not therefore demand more particular mention.

And now, before discussing or stating the principles recognized by these authorities, let us state the facts of this case, so far as they are urged by plaintiffs to invalidate this sale.

June 7, 1852, the record recites that Jones was appointed guardian of the property of "William, Eliza, Rachel, Elizabeth, Armanda, and Mary, minor heirs of Hugh Pursley, late of Polk County, Iowa, deceased." In this record it will be observed that the name of Jacob is omitted. The guardian's bond, however, includes the name of Jacob as well as the other heirs, and obligates him to faithfully discharge his trust as to his property, as well as of all the others. On the 17th of June, 1852, he filed his petition to sell the real estate of said minors, not setting forth their names, but describing them as "the minor children of Hugh Pursley, late of said county [Polk], deceased"; and on the 23d of the same month he made application for letters of guardianship as to the said Jacob, and that he be included in the petition to sell the real estate, and in the order of the court made in the premises; and the record recites that "the application, being duly considered, is granted; thereupon the said Jones gave bonds and qualified according to law."

Upon the presentation of the petition, it was ordered (the order reciting the names of five of the heirs, omitting Jacob and Mary, but still adding "minor heirs of Hugh Pursley, deceased") that it be heard at the next term, and that a copy of the petition and notice of the time of hearing be served upon said minors. At the July term (5th) the further hearing was continued to the August term. The notice to the heirs, attached to a copy of the petition, was directed to all of the heirs by name, and notified them that on the 5th of July application would be made to sell the land described in the within petition. As to the correctness of this description, there is no question. The officer's return is, that on the 18th of June he "served the above notice by reading it to the above-named

William and Jacob Pursley, etc. [giving all their names], minor heirs of Hugh Pursley." August 3, 1852, the petition was heard, and the order recites: "Now comes J. C. Jones, guardian of the minor children of Hugh Pursley, deceased, and the matters and things contained in his petition, etc., . . . upon full consideration it is ordered and adjudged that the guardian proceed to sell, etc., on the second Monday in September, 1852, at public outcry, etc." September 11, 1852, the guardian made his report of the sale to the county court, setting forth the sale of the several tracts of land, giving them by numbers (as lot 1, of so many acres, etc.), the person to whom sold, and for what price.

This report was approved in due form by the court. Deeds were made by the guardian to the parties under whom defendants claim, on the 25th of July, 1854, approved by the county judge February 28, 1854; and on the 5th of November, 1855, approved the same day. Neither of these deeds described the heirs by name, but described the property as belonging to "the minor heirs of Hugh Pursley, deceased." It is claimed that the conveyances were void for want of certainty in the description of the land, which will be noticed hereafter. The guardian's bond was made payable to Polk County, and before making the sale he gave bond as required by section 1504 of the Code of 1851 (Revision, 2556), properly conditioned, but payable, like the other, to Polk County, Iowa. The guardian's oath is for the faithful discharge of his duties under his appointment, for all the heirs, naming Jacob, as well as the others; and was taken June 7, 1852. The first bond describes all the heirs by name; the second refers to his application, and describes the land as "belonging to the estate of Hugh Pursley, deceased." The plaintiffs proved that defendants were in possession continuously for six years before the commencement of this suit, and defendants established that improvements were made, and this possession commenced in 1854 or 1855. As before stated, this action was commenced July 15, 1863. To the objections made to the validity of this sale, appellees make two answers: 1. That there was no such irregularities as can affect their title; 2. That by the statute (Code, 1508; Revision, 2560) it is too late to question its validity.

The statute referred to is as follows: "No person can question the validity of such sale after the lapse of five years from the time it was made."

Appellants insist that the statute has reference to voidable and not void sales, and is only applicable to appeals or writs of error, or some process bringing up the matter for review and reversal in a superior court.

The latter part of this proposition is most clearly untenable. If true, it gives five years after the sale to prosecute an appeal from the action of the county court; whereas, we have a general statute (Code, sec. 131; Revision, sec. 267) expressly requiring such appeals to be taken within thirty days, and pointing out specifically the manner of taking the same. And upon no tenable or reasonable ground can it be claimed that section 1508 was intended to modify, change, or affect that relating to appeals. The remedy by appeal is provided for by section 131 of the Code (in force when this sale was made and approved), and it would violate every rule of construction to hold that this subsequent section, which says nothing about appeals or writs of error, which is not treating of that subject, was intended to extend the time, or give any different rule. There is nothing in the language justifying any such conclusion. To "question the validity of such sale," implies a proceeding other than by appeal. An appeal ordinarily brings before the court only the parties to the proceeding; in this case, the guardian and the ward. The purchaser would not be a party to such an appeal. This language, however, indicates the questioning of the sale, a proceeding against the purchaser, an attack upon his title. Than this, nothing can be clearer. And this construction is impliedly, if not directly, recognized in *Cooper v. Sunderland*, 3 Iowa, 121 [66 Am. Dec. 52]; and the case of *Vancleave v. Milliken*, 13 Ind. 105, arising under a very similar statute, is entirely untenable if appellants' position is correct.

But let us advance one step further. There are two other classes of cases to which this statute might be made applicable: one where the county court had no jurisdiction; the other where, having jurisdiction, the court or guardian failed to comply with the provisions of the statute in ordering, conducting, or confirming the sale.

There is a very clear distinction between a sale by a person not a guardian, with no pretense of appointment or authority to sell,—a mere volunteer acting upon his own motive,—and a sale by one duly appointed, who fails to comply with all the provisions of the statute. In the former case we should be very clear that section 1508 would not estop the heir from

questioning the validity of the sale; for it is sales made by one having at least the semblance of authority which are intended to be covered by the statute. And if made by one having no authority, nor the semblance thereof, it does not come within either the letter or spirit of the statute. To thus extend the meaning of the statute would render it, we think, justly obnoxious to the objection made by counsel of being in conflict with the constitution, which secures the individual in his property until taken from him by due process of law. For if the heir, after five years (without reference to the question of possession), is concluded by a sale made by one acting entirely without authority, or the pretense thereof, then we know of no clearer case of judicial legislation; no case which would more flagrantly violate the fundamental provision securing all persons in life, liberty, and property. This, then, was not the meaning of the statute.

But suppose the guardian is acting under a proper commission, and makes a sale without any notice, or pretense thereof, to the heir; that the whole proceedings are conducted without giving or attempting to give him a day in court; that the purchaser does not enter into possession of the property, but the heir retains the same undisturbed, and after five years from the time of the sale, the heir, directly or collaterally, attacks the same,—will this statute protect the purchaser? In other words, in such a case, could he use it as a weapon to take from the heir his inheritance? We clearly think not. For this, instead of making the statute one of repose, one to protect and shield the purchaser in his possessions, would, in legal effect, deprive a party of his property without notice, without due process, without the existence of that adverse possession which might impose upon him the duty of action, or the taking of some step before the expiration of five years. It is very clear to our minds, that if the heir had no notice, and hence the court no jurisdiction, and no possession was taken under the purchase, the purchaser could not use the statute to protect him in his title. For if so, then, if the ward remained in possession notoriously, adversely, and uninterruptedly for ten years, the statute which prohibits him from questioning the validity of the sale after the lapse of five years from the time it was made would prevent the bar of the general statute on his part, and become an oppressive weapon on the part of his adversary, instead of a shield to protect him in his possession and purchase; and that the latter was the intention of the

legislature, is, we think, most clearly inferable from the plain language of the enactment.

Thus far we have had no difficulty. Take the case, however, where there was no notice, and hence no jurisdiction, but where the purchaser takes possession, and keeps it for more than five years from the date of the sale, will this statute estop the heir from questioning the validity of such sale? If so, then is it not because the party is to be treated as in possession, under color of title, and hence protected against the attack? And yet, it would seem anomalous to say that another could obtain color of title to my property without notice to me of the proceedings upon which he bases his claim. True, it is said that if the statute does not cover such a case, then there is nothing to which it can apply. For the argument is, if these were mere irregularities, not matters jurisdictional in their nature, tending to impeach the sale, the purchaser is protected as well before as after the five years, and hence this section would be without meaning or force. And yet it seems to us that this argument is not entirely sound. Before the expiration of the five years, cases can be readily imagined where the sale might be directly but not collaterally attacked; whereas after the expiration of the time neither method of attack would avail. Nor would the grounds of such attack be jurisdictional in their nature. Thus, suppose a bill should be filed attacking the sale for fraud,—combination between the guardian and the purchaser to defraud the ward. While the ward might sue the guardian on his bond, he would certainly not be limited to such remedy. And yet every provision of the statute might have been complied with, no question of jurisdiction arising. Such an attack, direct in its nature, might be made before five years, and yet not after that time. And thus, as it seems to us, many cases might be supposed to which the statute might apply, without going so far as to protect a title when there was no jurisdiction or power in the court to order the sale.

We would not be understood, however, as passing positively upon this statute, when applied to a state of facts last supposed. This much we have deemed it proper to state, as suggesting possible, not to say probable, difficulties, before turning to another and final view of the case before us.

Defendants were in possession of this land for more than five years from the time of sale. The statute makes no saving on account of the nonage of the heir or party attacking

the sale. The objections made arise in a collateral, and not a direct, proceeding. If the court had jurisdiction of the parties and subject-matter at the time of the ordering and confirming the sale, then we are very clear this case was decided right. For, concede that if there was no jurisdiction the purchaser would not be protected, we have no hesitation in holding that he would be when the questions made are not jurisdictional, and especially in a collateral proceeding. This proposition is in effect admitted by appellants, and hence we need not elaborate it nor cite authorities in its support. For while it is claimed that all judgments and proceedings where there was no jurisdiction over the parties and subject-matter are void, and may be avoided collaterally, it is at the same time admitted that those voidable merely cannot be thus attacked.

Turn, then, briefly to the facts of this case. The objections to the validity of the proceeding are: 1. There is no sufficient caption to the county court record; 2. No legal appointment of Jones as guardian for want of power to appoint for seven heirs jointly; the bond is joint, and hence is void; it is payable to the county, and is not approved, so far as shown by any recitals of record; 3. The petition did not set out the names of the minors, and hence there was no jurisdiction; 4. The order on filing the petition is *coram non judice*; 6. A copy of the petition was not served on the minors; 7. There was no guardian for Jacob when the petition was filed and notice served; 8. The final order recites no jurisdictional facts, and especially omits the essential fact upon which it rested, to wit, the necessity of the sale; 9. No bond was given to execute the sale, — that is, it was void upon its face, and was not approved by the court of record.

These objections we do not propose to discuss *seriatim*. A general reference to them, it seems to us, will be sufficient to show that none of them go to the vital question of jurisdiction, except the sixth, which relates to the service. All the others relate rather to the regularity of the proceedings than to the question of power. And, once for all, let it be understood that such objections cannot avail to invalidate a title when raised in a collateral proceeding, and especially when made for the first time after five years from the time of the sale, and where the purchaser took and held possession thereunder. Every case in this court hereinbefore cited enunciates this principle, and not one can be found in conflict.

What are these objections other than the sixth? Take the

one that these bonds (the one for the guardianship and to sell) were made payable to the county. The law does not in terms direct to whom such bonds shall be made payable: Code, secs. 1496, 1504. It would be better, of course, to make them payable to the parties interested; but the statute expressly declares that a mistake in this respect will not vitiate the security: Code, sec. 2506. And further that if a bond given to a county is intended for the security of any particular individual, suit may be brought thereon in the name of any one thus secured who has sustained any injury by a breach thereof: Code, sec. 1693. And see *Charles v. Haskins*, 11 Iowa, 329 [77 Am. Dec. 148]. And then, as to their approval, the law does not declare that such approval shall be entered of record. The power to sell would certainly not be affected by a failure to make such entry. Bonds were given, the proper oath taken, and these were found as a part of the proper record in the case. One of them had the county judge's order of approval indorsed on it, and while the other did not have, this failure could not invalidate the title derived from the sale. No case can be found among all those cited which, by analogy even, treats this as a jurisdictional defect.

And the same may be said of the want of caption to the county court record. What is meant by this we do not exactly understand. Every entry in the county court records seems to be preceded by the date of the entry, and sufficient to show that it was made in the proper county court. So the petition is directed to the proper tribunal, and in these respects we can see no departure from even the most technical rule.

Next is the objection that the guardian was appointed for the wards jointly, and the bonds are for their security in the same manner. The record discloses that these lands constituted the entire property of these minors. Each ward did not have property in his own right distinct from the others. They all held by a common title as tenants in common. And certainly nothing has been more common in our practice than to appoint one guardian for all minors thus interested, and no rule of the statute can be found forbidding it. True, the guardian ought to keep his account with each ward separate and distinct. And this is all that is held in this respect in the case of *Foteaux v. Lepage*, 6 Iowa, 123, to which counsel so frequently refer. But a failure on the part of the guardian to comply with his duty in this respect would not invalidate a

title held under a sale made by him. And we may be allowed to add that, where property is held as in this instance, economy and a sound discretion would dictate that the trust should be imposed upon one instead of upon several persons. We fail to see any legal or reasonable objection to such a practice.

But it is said that the petition does not set out the names of the minors, and hence there was no jurisdiction; that there was no guardian for Jacob Pursley when the petition was filed, and hence his title was not divested by the sale; that the order filing the petition was *coram non judice*; that the final order recites no jurisdictional facts, and especially omits the essential fact that there was a necessity to sell.

If this application is to be treated as an original action in the county court, we might concede that a petition against the "minor heirs of Hugh Pursley, deceased," without more, and a notice in the same form would be ineffectual to confer jurisdiction. This is certainly the substance of the ruling in *Reynolds v. May*, 4 G. Greene, 283, and *Steamboat Pembina v. Wilson*, 11 Iowa, 479. And though in those cases the objection was made on appeal, the reasoning used goes to the extent stated.

In this case, however, the notice was to the heirs by name, and was served upon each.

The order of appointment as amended was alike specific in naming the heirs.

The proceeding was not commenced against them as the "minor children of Hugh Pursley, deceased"; but the petition uses this language merely as descriptive of the relation of the said Jones to the property, and those having an interest in it. It is as though he had brought an action in his name "as guardian of William Pursley," etc. (giving the names of all the heirs), and the petition had omitted the names, but described them in an abbreviated form as the children of the party from whom the property was taken by descent. In such a case, there would be no good ground for claiming that this defect in the petition was jurisdictional, nor that one holding under the judgment could be defeated in his title. No more can there in this; and especially where, as a matter of fact, those named were the only minor heirs, and the whole record discloses that they were sufficiently named and described.

That the name of Jacob was not entered with the others in

the order of appointment, we give but little weight. It was manifestly a mere clerical omission, for the bond includes his name with the others. The subsequent proceedings were entirely regular for the order made, but carried out what was originally intended. The petition to sell included all; the bond was for the benefit of all; and to obviate all question, the order made in terms included him. As suggested, this hardly seems to us irregular, and it certainly was no more. The purpose intended, to make him a party to the proceeding, was sufficiently accomplished, and beyond this we will not inquire in this action: *Doe v. Smith*, 1 Ind. 458.

Upon filing the petition, the county court ordered how service should be made, and that the same should be heard at the next term thereof. This was just what the law contemplated (Code, secs. 1501, 1502), and why it is insisted that such order was *coram non judice* we cannot imagine.

So of the final order to sell. The petition alleged the requisite jurisdictional facts, and the truth of these averments was necessarily found in making the order; for it was after a hearing and upon a full consideration of the petition that the sale was ordered. It never has been required in this state that the records of these inferior tribunals should recite in detail the facts upon which the ultimate and essential conclusion was based: And see *Philadelphia etc. R. R. Co. v. Stimpson*, 14 Pet. 448; Code, sec. 2512.

And that this general disposition of these several points accords with principle and authority, sufficiently appears from the foregoing cases and rules.

The county court is, we admit, a court of limited and inferior jurisdiction. However, like a court of general jurisdiction, every intendment will be indulged in favor of its acts, when acting within the scope of its power. That is to say, if jurisdiction has once attached, then the presumption obtains in favor of all the subsequent proceedings; and mere irregularities or defects will not avail collaterally. Thus, as to a defect in a petition, if it relates to a proper subject-matter, so as to invoke legitimately the action or jurisdiction of the court, its sufficiency in a collateral proceeding cannot be called in question. The right to decide is one thing, and the decision itself quite another. For the right to decide arises only when there is jurisdiction; and unless it exists, no right can follow from it. But the right existing, error of decision may be corrected; but it cannot reach forward and affect those who have.

in good faith, relied upon its correctness: *Perrine v. Farr*, 22 N. J. L. 356.

Thus the power to decide being shown, this power is not lost or taken away because it may be improperly exercised. And hence, if the parties are properly in court, that these names are ordered to be inserted in a petition already filed, instead of filing a new petition; that there was a defective bond, either in the amount or formal conditions, received and accepted as good, however, by the court; that there may have been error in the conclusion reached upon the facts shown; — all these and similar matters must be accepted as absolutely conclusive in a collateral proceeding; and this, whether the court is one of limited and inferior or general and superior jurisdiction: *Brown v. Wood*, 17 Mass. 68; and the well-known case of *Grignon v. Astor*, 2 How. 319; *Lampson v. Platt*, 1 Iowa, 556; *Thompson v. Tolmie*, 2 Pet. 157; *Morrow v. Weed*, 4 Iowa, 77 [66 Am. Dec. 122]; *Perkins v. Fairfield*, 11 Mass. 227; and see *Elliott v. Piersol*, 1 Pet. 328, referred to by counsel, and sometimes thought to be in conflict with the foregoing authorities; but in which it is said "that when a court has jurisdiction, it has a right to decide every question that arises in a case; and whether its decisions be correct or not, its judgment, until reversed, is regarded as binding on every other court." See also *McPherson v. Cunliff*, 11 Serg. & R. 427 [14 Am. Dec. 642]; *Bangs v. Duckingfield*, 18 N. Y. 592; *Knowles v. City of Muscatine*, 20 Iowa, 248.

It must not be forgotten that to the county courts, at that time, as now, were given the power to appoint guardians, and to exercise a general supervision over their property, person, and interests: Code, sec. 1273. So far, therefore, as the subject-matter was concerned, the jurisdiction was expressly given; and if not exclusive, was at least general. If the matter to be adjudicated was brought before it by a proper petition or complaint, and the parties to be affected thereby were duly notified thereof, then, by an unbroken series of decisions in this state and elsewhere, while an appellate tribunal might correct errors thereafter intervening, there is no power to inquire into them collaterally: See the cases before cited in this state, where the authorities are fully collected, and particularly *Wright v. Marsh*, 2 G. Greene, 94.

In a word, the decided current, if not uniform weight, of the authorities leads us to ask, — 1. Did the court have jurisdiction of the subject-matter? 2. Of the parties? and if so, the

judgment, in the absence of fraud, becomes conclusive, and can in no manner be impeached collaterally. And all efforts to insist upon errors or irregularities to thus impeach are without warrant, and without the support of respectable precedent.

The party purchasing has a right to rely upon this conclusiveness of the judgment, and it would, we feel bound to say, unsettle half the titles in the state (and that greatly to the prejudice of infants and their estates) to innovate upon this well-established and most reasonable doctrine. Let the guardian be held to strict accountability for his fraud or negligence, or any conduct tending to the prejudice of his ward. Make him and his sureties respond promptly and adequately in damages; but it would, in our opinion, be as disastrous to the rights of infants and purchasers as it would be in the teeth of principles long and well settled to hold invalid sales for every departure from some directory provision of the statute, or for every error of decision in courts ordering the sales.

If these views be correct, we are left to inquire whether the county court had jurisdiction of the parties. The notice, it will be remembered, was attached to the petition, referred to it, and advised the parties interested that the application would be made to sell the land described therein, as to the correctness of which description there is no question. The officer returns that he served the notice by reading it to all the children or minors named therein.

The statute requires that the application to sell shall state the grounds thereof, be verified by oath, and a copy thereof, with a notice of the time at which such application will be made to the court, must be served personally upon the minor at least ten days prior to the time fixed for such application: Code, sec. 1501.

The petition did state the ground, was duly verified, and service was made more than ten days before the time fixed for the hearing. But the objection is, that a copy of the petition was not served upon these minors, and therefore that the court did not acquire jurisdiction over the parties.

We should be inclined to give more weight to this objection if the notice had been detached from the petition and made no reference to it. But attached as they were, we think it but a fair inference that they were treated as constituting one paper, and so served. The law does not require that a copy of the petition and notice should be left with the minor, but that

he should be personally served. That the officer would comply with the statute by reading the same to the minor, or at least that the court might consistently hold this to be a good service, we entertain no doubt. For at this time the general statute regulating service did not require a copy to be given unless the same was demanded. Service, when made personally, was by reading: Code, sec. 1721; and see *Id.*, c. 133.

To hold that the return in its language did not cover and include in its meaning the entire paper in the officer's hands for service would lead to the presumption that he failed and neglected to discharge a plain duty imposed upon him by law. A court will not intend facts inconsistent with the return of a writ, in order to divest rights acquired under it, nor to defeat a judgment of a court of competent jurisdiction: *Boker v. Chapline*, 12 Iowa, 204.

But if it be admitted that the notice alone was served, then we have this case: There was a personal service; this was returned, and accepting it as sufficient, the court ordered the sale; this was made in good faith; the guardian made due return thereof; this was approved; deeds were made; these approved; the consideration paid; possession taken thereunder, and continued adverse, notorious, and uninterrupted for more than five years; and now it is claimed that the title did not pass, and plaintiffs can contest defendant's right of possession, because a copy of the petition was not served with the notice. Most appropriately, in our opinion, will the five years' statute cover such a case. It is not a case of no notice, but of defective notice; of no service, but defective service; and after five years plaintiff should not be allowed collaterally to aver its insufficiency.

Then, again, the statute declares that the proceedings of all courts of limited and inferior jurisdiction within this state, like those of general and superior jurisdiction, should be presumed regular, except in regard to matters required to be entered of record, and except when otherwise expressly declared: Code, sec. 2512. We know of no statute requiring the return of service in this class of cases to be entered of record; or a recitation that due service was made to be contained in the judgment; nor is there any expressly excepting county courts, in proceedings of this character, from this general rule. Still, we are not to be understood as holding that if there was nothing to show service of any kind, we would indulge the presumption that there was jurisdiction over the

person; and yet this is the rule as applied to a court of general jurisdiction. But when there is a notice and return of personal service, a defect in it, which the tribunal has held and treated as immaterial, ought not and cannot, in view of the language of our statute, and following the clear current of authorities in this state, avail to defeat a title where the objection is raised for the first time in a collateral proceeding. See the cases before cited, and particularly *Cooper v. Sunderland*, 3 Iowa, 114 [66 Am. Dec. 52]; *Morrow v. Weed*, 4 Id. 77 [66 Am. Dec. 122],—cases which, we may here say, have been frequently criticised in argument, but which upon a re-examination, we feel bound to affirm in their essential principles, however much any member of the court may differ from some of the reasoning used. See also *Bonsall v. Isett*, 14 Iowa, 309; *Davenport Mutual Savings Fund and Loan Association v. Schmidt*, 15 Id. 213; *Homer v. Doe*, 1 Ind. 130; *Thompson v. Doe*, 8 Blackf. 336. The case of *Doe v. Bowen*, 8 Ind. 197 [65 Am. Dec. 758], relied upon by counsel, was one where the order of sale was made on the same day the inventory was filed, where no mention was made of the existence of an heir, and where there was no notice nor prayer for one. On this subject, see, further, *Nelson v. Moon*, 3 McLean, 319. In that case the infants were not served, but they appeared by a guardian *ad litem*. It was asserted that they could not waive process. Says McLean, J.: "If it be admitted that for this defect in the proceeding the supreme court would have reversed the decree, yet it does not follow that the decree, when collaterally assailed, can be treated as a nullity. . . . The objection, at most, is to an irregularity, which might be a ground of reversal, but does not show a want of jurisdiction in the court; and this must clearly appear before the decree can be treated as a nullity." And see *Adkins v. Brewer*, 8 Cow. 206 [15 Am. Dec. 264].

The great error into which counsel fall is in failing to recognize the distinction between a defective service and no service. If, in this case, there had been no service, what has already been said unmistakably indicates (waiving the five years' limitations) that this sale would be held invalid. But there was a service; the return was, at most, irregular, such as might have been held bad on appeal. And after the county court recognized its sufficiency and approved the sale, made pursuant to its order, we will not in this proceeding inquire into its sufficiency. The proper persons were served; the

court had jurisdiction of the subject-matter, and hence it differs from those cases where the wrong person was served (by a substituted service, for instance), or where the court had no power to act upon the subject presented for its determination. It is as though the statute had required service by reading, and it was made by leaving a copy. It could not be claimed, in such a case, that the order following was void for want of jurisdiction. But, without further extending the argument, see *Miller v. Brinkerhoff*, 4 Denio, 118 [47 Am. Dec. 242]; *Staple v. Fairchild*, 3 N. Y. 41; *Skinnion v. Kelley*, 18 Id. 355; *Imbert v. Hallock*, 23 How. Pr. 456; *King v. Pool*, 36 Barb. 242; *Hunter v. Lester*, 10 Abb. Pr. 260; *President of Orphans' Court v. Groff*, 14 Serg. & R. 181.

Finally and very briefly we notice the claim that the deeds made by the guardian were void for uncertainty in the description of the premises sold and conveyed.

It seems that the land to be sold by the guardian was surveyed and platted, the lots being numbered from 1 to 7, and a copy of the plat is a part of the record. The deed under which the defendant Hayes claims describes by metes and bounds one and one quarter acres of one of these lots; and refers to the lot as "lot (1) in the survey of said land, being a part of the southeast quarter of section 5, township 78, range 24 west, 5 P. M." The other deed refers to the same survey by its date, and conveys all of said lot 1, after excepting by metes and bounds the parcel formerly conveyed to the party under whom Hayes claims.

Here there is no uncertainty as to the quarter-section in which the land is to be found. Nor, with the aid of the plat of the surveyor, is there the least doubt as to the lot sold and conveyed. Indeed, with this we have the exact locality of the land.

It is conceded that if land is so described in a conveyance as to render its identity wholly uncertain, the grant is void: See *Glenn v. Maloney*, 4 Iowa, 315; *Bosworth v. Farenholz*, 3 Id. 84. This last case is more analogous to the one before us than the first, and yet is quite unlike it. There the lot was described as so many feet of a certain lot, without more. Nothing whatever was stated from which the true location of the land could be ascertained. Here we have the *data* from which the land sold can be known and fixed. A grant is not void for uncertainty if the court can imagine testimony which would show any particular monument to be that which is

called for in the grant: *Blake v. Doherty*, 5 Wheat. 359. A party may introduce other evidence, whether in writing or by parol, to apply the instrument to the subject-matter: *Crafts v. Hibbard*, 4 Met. 438. A deed is not void for this cause if it can be made good by any construction: *Webber v. Webber*, 6 Greenl. 127; 2 Black. 379; and see, generally, *Dygert v. Pletts*, 25 Wend. 402; *Laub v. Buckmiller*, 17 N. Y. 620; *Jackson v. Parkhurst*, 4 Wend. 369; *Corbin v. Jackson*, 14 Id. 619 [28 Am. Dec. 550].

Thus at much length we have passed upon the several points made by appellants' counsel. Their importance to the parties, and the confidence with which they were asserted, must furnish a sufficient excuse for noting many of these, apparently well settled by our prior adjudications.

Affirmed.

VERDICT AGAINST EVIDENCE SHOULD BE INSTANTLY SET ASIDE: *Crossley v. O'Brien*, 87 Am. Dec. 329; note to *Johnson v. Winona etc. R. R. Co.*, 88 Id. 88.

JUDGMENTS AND PROCEEDINGS OF COURTS MAY BE ATTACKED COLLATERALLY, where there was no jurisdiction: See note to *Cochran v. Van Surlay*, 32 Am. Dec. 588; *Wallace v. Brown*, 76 Id. 421; *Butcher v. Bank of Brownsville*, 83 Id. 446; *Sidensparker v. Sidensparker*, 83 Id. 527, note 533; because they are void. Thus, where the court usurps power in ordering a sale, and has no jurisdiction, therefore, to order such sale, the order is not conclusive upon the validity of the sale where it is drawn in question in a collateral proceeding: *Young's Adm'r v. Rathbone*, 84 Id. 151; *Withers v. Patterson*, 86 Id. 643. Jurisdiction is an open question always, and may be inquired into collaterally: *Wallace v. Brown*, 76 Id. 421; note to *Cochran v. Van Surlay*, 32 Id. 588. Fraud in proceedings does not render judgment absolutely void as between parties and privies, and it must be directly attacked; but strangers may attack a judgment collaterally at any time on the ground of fraud: See note to *Boston etc. R. R. Corp. v. Sparhawk*, 79 Id. 752; *Sidensparker v. Sidensparker*, 83 Id. 527; note to *Greene v. Greene*, 61 Id. 468.

JUDGMENTS AND PROCEEDINGS HAVING JURISDICTION OF PARTIES AND SUBJECT-MATTER ARE, in absence of fraud, conclusive, and cannot be attacked collaterally: *Young's Adm'r v. Rathbone*, 84 Am. Dec. 151; *Finneran v. Leonard*, 83 Id. 665, note 667; *Wimberly v. Hurst*, 83 Id. 295; *Boston etc. R. R. Corp. v. Sparhawk*, 75 Id. 750; note to *Wallace v. Brown*, 76 Id. 428. As to judgments against infants, their validity, and how to correct or avoid them when they are erroneous or voidable, see extended note to *Joyce v. McAvoy*, 89 Id. 185-193, where the subject is discussed.

DECISION OF COURT OF GENERAL JURISDICTION AS TO SERVICE OF PROCESS UPON PARTY, or waiver thereof, is conclusive, and not subject to collateral attack in domestic tribunals: *Callen v. Ellison*, 82 Am. Dec. 448; *Borden v. State*, 54 Id. 217.

PRESUMPTIONS ARE IN FAVOR OF JUDGMENTS AND PROCEEDINGS OF COURTS OF GENERAL JURISDICTION, and that they have jurisdiction, etc.: See note

to *Withers v. Patterson*, 86 Am. Dec. 653; *Butcher v. Bank of Brownsville*, 83 Id. 446, note 451; *Finneran v. Leonard*, 83 Id. 665; *Reynolds v. Stansbury*, 55 Id. 459, note 464; *Kenney v. Greer*, 54 Id. 439; *Palmer v. Oakley*, 47 Id. 41; *Carter v. Jones*, 49 Id. 425, note 428; *Jackson v. Astor*, 39 Id. 281; *Horne v. State Bank of Indiana*, 48 Id. 359.

JURISDICTIONAL FACTS, SUCH AS SERVICE OF PROCESS UPON PARTY, OR WAIVER THEREOF, ARE CONCLUSIVELY PRESUMED in case of a judgment rendered by a court of general jurisdiction, unless the record itself shows the contrary: See note to *Withers v. Patterson*, 86 Am. Dec. 653; note to *Callen v. Ellison*, 82 Id. 454; *Tunis v. Withrow*, 77 Id. 117.

NO PRESUMPTION PREVAILS IN FAVOR OF JURISDICTION OF INFERIOR AND LIMITED COURTS, but such jurisdiction must be shown: See note to *Butcher v. Bank of Brownsville*, 83 Am. Dec. 451; extended note to *Stiles v. Stewart*, 27 Id. 145; *Carron v. Martin*, 69 Id. 584, note 589; *Saltonstall v. Riley*, 65 Id. 334; *Lowry v. Erwin*, 39 Id. 556; *Kenney v. Greer*, 54 Id. 439, note 448; *Reynolds v. Stansbury*, 55 Id. 459; note to *Withers v. Patterson*, 86 Id. 653; but where the jurisdiction of an inferior and limited court is shown, there the same presumption prevails in favor of its proceedings that does in favor of those of a superior court: *Cooper v. Sunderland*, 66 Id. 52; *Root v. McFerrin*, 75 Id. 49.

COUNTY COURTS IN SOME STATES ARE, AS TO SOME MATTERS, COURTS OF GENERAL JURISDICTION, and their orders and judgments are shielded from collateral attack, and guarded by the same presumptions in favor of their validity as apply to other courts of general jurisdiction: See note to *Withers v. Patterson*, 86 Am. Dec. 653; *Skinner v. Moore*, 30 Id. 155. As to whether probate courts are courts of general or of limited jurisdiction, see note to *Withers v. Patterson*, 86 Id. 653; *Borden v. State*, 54 Id. 217; *Dancy v. Stricklinge*, 65 Id. 179, note 185. As to collateral attacks upon probate decrees, see note to *Fitzgibbon v. Lake*, 81 Id. 304.

TITLE OF PURCHASER IS PROTECTED UNDER DECREE OF COURT HAVING JURISDICTION, whether a sale under the decree is attacked collaterally or by direct proceedings to reverse the decree: *Moore v. Neil*, 89 Am. Dec. 303; and the power of a probate court to act will sometimes be presumed on a collateral attack, although on a direct appeal or writ of error from the probate proceeding it would be held irregular and set aside: *Schnell v. City of Chicago*, 87 Id. 304.

COLLATERAL ATTACKS UPON PROCEEDINGS IN REFERENCE TO GUARDIAN'S SALE: See *Montour v. Purdy*, 88 Am. Dec. 88, note 95; *Brown v. Christie*, 84 Id. 607, note 610; *Dancy v. Stricklinge*, 65 Id. 179; *Cooper v. Sunderland*, 66 Id. 52; *Fitzgibbon v. Lake*, 81 Id. 302; note to *Loyd v. Malone*, 74 Id. 186; *Emery v. Vroman*, 88 Id. 726.

GUARDIAN'S SALE, IRREGULARITIES IN, WHEN NOT FATAL: See note to *Gibson v. Roll*, 81 Am. Dec. 223, 224; *Palmer v. Oakley*, 47 Id. 41; *Boon v. Bowers*, 64 Id. 159; *Emery v. Vroman*, 88 Id. 726.

GUARDIAN'S SALE IS VOID, WHEN: *Mattingly's Heirs v. Read*, 79 Am. Dec. 565; *Penn v. Heisey*, 68 Id. 597, note 603; cases cited in note to *Brown v. Christie*, 84 Id. 611.

GUARDIAN'S OR ADMINISTRATOR'S SALE WITHOUT NOTICE, OR WITH INSUFFICIENT NOTICE, EFFECT OF: See collected cases in note to *Gibson v. Roll*, 81 Am. Dec. 223.

NECESSITY FOR GUARDIAN'S SALE OF WARD'S REAL ESTATE MUST APPEAR: *Loyd v. Malone*, 74 Am. Dec. 179.

MINOR IS BOUND BY LAWFUL ACTS OF HIS GUARDIAN: *Dancy v. Strickland*, 65 Am. Dec. 179, note 185.

AS TO WHETHER INFANT WARDS NEED BE MADE PARTIES OR NOT, in proceedings to sell their real estate, see *Gibson v. Roll*, 81 Am. Dec. 219, note 223; note to *Smith v. Race*, 81 Id. 239.

FACTS GIVING JURISDICTION TO ORDER GUARDIAN'S SALE MUST APPEAR OF RECORD, WHEN: See note to *Fitzgibbon v. Lake*, 81 Am. Dec. 304. As to what must appear, and when sufficient, see note to *Loyd v. Malone*, 74 Id. 186; *Young v. Lorain*, 52 Id. 463.

PRESUMPTION IS THAT PUBLIC OFFICER DOES HIS DUTY: *Farr v. Sims*, 24 Am. Dec. 396.

FAILURE TO APPROVE OR FILE OFFICIAL BOND DOES NOT AFFECT VALIDITY OF GUARDIAN'S SALE. It is a mere formality: *Emery v. Vroman*, 88 Am. Dec. 726, note 730.

GUARDIAN'S, EXECUTOR'S, OR ADMINISTRATOR'S SALE IS VOID, IF PROPER NOTICE BE NOT GIVEN: See collected cases in note to *Morris v. Hogle*, 87 Am. Dec. 246; note to *Flint River Steamboat Co. v. Foster*, 48 Id. 270.

JUDGMENT AGAINST INFANT: See extended note to *Joyce v. McAdoo*, 80 Am. Dec. 185-193, where the subject is discussed.

DEFECTIVE RETURN OF SERVICE DOES NOT ALWAYS RENDER JUDGMENT VOID: *Byers v. Fowler*, 54 Am. Dec. 271. And a judgment cannot be impeached in a collateral proceeding by showing want of service of process: *Bridgeport Savings Bank v. Eldredge*, 73 Id. 688, note 693; *Durham v. Heaton*, 81 Id. 275.

DEED OR GRANT, WHEN VOID FOR UNCERTAINTY OF DESCRIPTION: See note to *Gant v. Hunsucker*, 55 Am. Dec. 414; *Mann v. Taylor*, 69 Id. 750; note to *Wofford v. McKimma*, 76 Id. 57; note to *Nixon v. Porter*, 69 Id. 411.

DEED IS NOT VOID FOR UNCERTAINTY IF LAND CAN POSSIBLY BE IDENTIFIED: *Nixon v. Porter*, 69 Am. Dec. 408, note 411; *Alexander v. Miller's Ex'rs*, 70 Id. 314.

EXAMPLE OF INSUFFICIENT DESCRIPTION IN DEED: *Caldwell v. Center*, 80 Am. Dec. 131.

PAROL EVIDENCE IS ADMISSIBLE TO EXPLAIN SUBJECT-MATTER OF CONVEYANCE: *Wilson v. Cochran*, 86 Am. Dec. 574; note to *Prentiss v. Breaser*, 86 Id. 735.

THE PRINCIPAL CASE WAS CITED in each of the following authorities, and to the point stated: If the jurisdiction of inferior courts has once attached, every intentment will be made in favor of the validity of all their subsequent proceedings: *Cowin v. Toole*, 31 Iowa, 516; *Brown v. Davis*, 59 Id. 644; and mere irregularities and defects will not avail in a collateral proceeding; but the judgments and proceedings of inferior tribunals, like those of superior courts, may be attacked directly and set aside for fraud: *Cowin v. Toole*, 31 Id. 516. The sufficiency of service is a matter within the jurisdiction of the court before which process is returnable, and its adjudication upon that question cannot be attacked in a collateral proceeding, but must be regarded as conclusive until reversed or corrected for errors on appeal. The judgment as to service may be voidable, but it is not void, where it is insufficient only in the manner of making it: *Lees v. Wetmore*, 58 Id. 178; *Koehler v. Hill*, 60 Id. 564; *Myers v. Davis*, 47 Id. 330. The court before which process is returnable will be presumed to have acquired jurisdiction where it has adjudged that service was sufficient: *Tharp v. Brenneman*, 41 Id. 254. The receipt by

minors, after attaining their majority, of the proceeds arising from the sale of their real estate by their guardian during their minority, with full knowledge of all the facts in regard to such sale, is a ratification thereof, and estops them from denying its validity: *Test v. Lareh*, 76 Ind. 462. They are not entitled to have the money and the land too: *Deford v. Mercer*, 24 Iowa, 122. In Iowa a guardian's or administrator's sale is not valid unless the record of the proceedings of the court ordering the sale discloses the fact that the notice required by statute has been given: *Good v. Norley*, 28 Id. 195. The Iowa statute providing that "no person can question the validity of a guardian's sale after the lapse of five years from the time it was made," applies only to cases where the purchaser has taken and held continuous possession of the premises for the statutory period: *Washburn v. Carmichael*, 32 Id. 479. The Iowa statute providing that "no action for the recovery of any real estate sold by an administrator can be sustained by any person claiming under the deceased, unless brought within five years next after the sale," does not apply to and will not bar a sale that is absolutely void for want of jurisdiction in the court to order it: *Good v. Norley*, 28 Iowa, 201-203. So held by two of the judges only. In thus deciding, they relied upon the statute construed in the principal case, which was considered similar if not identical in effect. The other two judges held that the five-year limitation applied to invalid sales as well as to those which were merely defective, and that the action in this case was barred thereby. This was not considered in conflict with the principal case: See Id. 216, 217. The court being equally divided in opinion, the judgment of the court below sustaining the title derived through the administrator's sale was affirmed by operation of law. Notwithstanding the petition of an administrator for the sale of real estate is in some material respects defective, this fact does not authorize the sale to be set aside in a collateral proceeding, on the ground that the court did not by such petition acquire jurisdiction. In such cases the statute of limitations gives repose: *Read v. Howe*, 39 Id. 560. As to certainty in description of land, see *Russell v. Sveczy*, 22 Mich. 241; *Dutch v. Boyd*, 81 Ind. 148. The principal case was frequently referred to in *Deford v. Mercer*, 24 Iowa, 120, 122, 123, where other lands held by Puraley were in controversy. On page 123 some new cases were cited.

BURLINGTON UNIVERSITY v. BARRETT.

[22 Iowa, 60.]

VALIDITY OF WILL MUST BE DETERMINED BY LAWS OF STATE IN WHICH IT WAS MADE.

WILL MUST HAVE WITNESSES WHERE THEY ARE REQUIRED BY STATUTE.

RULE OF CONSTRUCTION FOR DETERMINING WHETHER INSTRUMENT IS WILL OR CONTRACT is, that if it passes a present interest, although the right to its possession and enjoyment may not accrue till some future time, it is a deed or contract; but if the instrument does not pass an interest or right till the death of the maker, it is a will or testamentary paper.

INSTRUMENT MAY BE PARTLY DEED AND PARTLY TESTAMENTARY.

IN DETERMINING WHETHER INSTRUMENT IS TESTAMENT OR CONTRACT, COURTS DO NOT ALLOW the use of language peculiar to either class of instruments, nor even the belief of the maker as to the character of the

instrument to control inflexibly their construction of it; but giving due weight to these circumstances, courts look further, and weighing all the language as well as facts and circumstances surrounding the parties and attending the execution of the instrument, give to it such construction as will effectuate the manifest intention of the maker.

CONSIDERATION SUFFICIENT TO SUPPORT CONTRACT. — ENDOWMENT OF INSTITUTIONS OF LEARNING; expense, liability, and trouble of officers of such institutions in raising endowments; or the undertaking of such officers to give "free tuition to twenty students forever," — constitute a sufficient consideration upon which to base a contract. .

THIS proceeding was originally a petition for the allowance of a claim against Barrett's estate, to be paid as the same should thereafter become due. A demurrer to the petition was sustained, and the plaintiff appealed to the district court, where the case, as an equity cause, was submitted upon the pleadings, evidence, and exhibits, and a decree was rendered against the defendant, and in favor of the plaintiff, for \$1,199, being the amount of the first five annual payments, with six per cent interest, and also for \$200 to become due January 1, 1867, and the sum of \$200 on January 1st of each year thereafter for five years, with six per cent interest after maturity, and the sum of \$20,000 to become due and payable when the plaintiff should have secured an additional endowment fund of \$30,000,—the fact of such additional endowment to be determined judicially. Defendant appealed. Other facts are stated in the opinion.

Grant and Smith, for the appellant.

J. M. Beck, for the appellee.

By Court, COLE, J. The plaintiff is an incorporation under and by virtue of the laws of this state. It has had an existence since 1852. At its organization, Dr. Richard F. Barrett (now deceased) gave to the Burlington University about five hundred dollars, and he became a member of its board of trustees, and so continued up to the time of his decease. He resided at the time in St. Louis County, Missouri, where he owned a large amount of property. During that time he also owned considerable real estate in and about Burlington, Iowa. He was in the habit of visiting Burlington in the summer of each year, and perhaps at other times, and frequently attended the proceedings of the board of trustees of the Burlington University, and was regarded as its patron and friend. In September, 1856, he lost a little son, by whose death he was much affected, and expressed his intention of giving that

child's share of his estate to some charitable institution. In October of the same year he signed and delivered to the secretary of the plaintiff a written declaration in which he expressed his intention to give such child's part of his estate to the Burlington University.

After this time, and prior to March 8, 1858, he had two or three attacks of paralysis. At the date last named, Richard F. Barrett, with his own hand, wrote and signed a paper which he styled his "last will and testament." Item 3 thereof was as follows: "Ten years after my death, I desire that twenty thousand dollars (\$20,000) be given to the Baptist College or University at Burlington, Iowa, in money, in debts or notes, in town lots, lands, or in anything that my estate can best spare; and my executors are to be the judges of its value, etc.; and as agriculture is the great interest of Iowa, I desire the institution to keep it as a fund, the interest of which is forever to be devoted to the support of a professorship, to be called the Barrett Professorship, to be devoted to agriculture, or to learning pertaining to agricultural affairs. It is to be given to said college provided it shall have before that time a permanent endowment of at least eighty thousand dollars (\$80,000), exclusive of the college buildings and grounds around them. I desire this sum to be given to said institution after it shall have insured to it the means of living, and not before. Institutions of the kind cannot live and prosper without an adequate endowment, and my bequest without more would be but a drop in the bucket. I therefore make it conditional, dependent on a previous endowment of eighty thousand dollars (\$80,000). With that sum and my bequest the institution should be able to live and prosper, conferring blessings, in the way of education, upon the youth of the town and county in which it is situated."

Afterward, and on the twenty-sixth day of July, 1858, the secretary and agent of the plaintiff visited Dr. Barrett at his residence in St. Louis County, Missouri, and spent much of the day with him. While there, the secretary wrote and Dr. Barrett signed the following paper, which is the basis of this action: —

"Whereas, I have in my last will and testament bequeathed unto Burlington University, Burlington, Iowa, twenty thousand dollars (\$20,000), to be paid in ten (10) years after my death, on condition that an endowment fund of one hundred thousand dollars (\$100,000) shall be secured by that time to this insti-

tution, inclusive of my bequest of twenty thousand dollars (\$20,000); I do now voluntarily agree and bind myself to pay, or to have this sum of twenty thousand dollars paid, on or before the said time, and on the condition that the institution shall have raised fifty thousand dollars (\$50,000), one half the sum aforementioned; and further to aid said institution, I also agree and bind myself to pay to the same two hundred dollars (\$200) per annum for ten years, commencing January 1, 1861, or until I shall have paid to the institution the aforesaid bequest of twenty thousand dollars. All of which I do, trusting to the board of trustees and the agent of said institution that they will in good faith execute the pledge voluntarily made to me in gratitude for my bequest; that free tuition shall be given to twenty (20) such students at a time, forever, as I shall nominate for the enjoyment of this benefit, or in case of my failure to nominate, shall be nominated by the board of trustees, in view of their indigent circumstances or good moral character and promise of eminence and usefulness; and also trusting that said board or agent will in good faith persevere in efforts to advance the interests of the institution until the same shall be fully and amply endowed by at least one hundred thousand dollars (\$100,000), the sum indicated in my bequest. In testimony of all which I do hereto set my hand," etc.

At a meeting of the executive committee of the board of trustees held August 2, 1858, the above agreement was read, accepted, and they pledged themselves to comply with its conditions, and notice thereof was mailed to Dr. Barrett, properly directed.

On the fourth day of July, 1859, Dr. Barrett revoked the paper or will of March 8, 1858, by tearing the same, with intent to revoke and destroy it, and also by writing and signing, entirely with his own hand, another paper or will expressly revoking therein "all other wills and codicils before made." The eighth item of this last will was as follows: "In March, 1858, I made a will in which I gave the Baptist College in Burlington, Iowa, twenty thousand dollars, conditionally. This bequest I have mentioned to several persons. Lest they think I am fickle, the following statement is due: In March, 1858, I had some fifty or sixty thousand dollars due me, bearing ten per cent; rents in Burlington, Iowa, of hotels, stores, offices, etc., amounting to ten or eleven thousand dollars,—thus making my income fifteen or sixteen thousand dollars. The said fifteen or sixteen thousand dollars have not been, nor can

they be, collected; interest therefore stops. Rents, then, of hotel, etc., amounting to ten or eleven thousand, are now less than three,—not enough to pay taxes, insurance, and interest on the money I borrowed to build addition to hotel,—so the twenty thousand I am not able to give to the college; and every prudent man says so. I therefore make a new will, and revoke the bequest, trusting that what I have already given to said college may enable it to succeed. This will is composed by myself, and written and signed with my own paralytic hand, this fourth day of July, 1859.”

There is no definite or satisfactory proof as to the amount of the estate of Dr. Barrett. The defendant, who is the son and administrator, testifies that the “estate will not pay the encumbrances on the estate and this sum too.” The agent of the plaintiff, who drew the agreement, testifies that the property belonging to that part of his estate, situated in Burlington, Iowa, is, over and above all encumbrances upon it, more than sufficient to pay plaintiff’s claim.

Dr. Barrett died in Burlington, Iowa, while on a visit there to spend the summer; his death occurring some time in May, 1860. It is also proved in the case that the Burlington University, in October, 1865, was out of debt and had property, including college grounds, buildings, library, etc., to the value of about thirty thousand dollars, besides an endowment fund raised since the above agreement was signed by Dr. Barrett, of five thousand dollars, and that it had at all times since been amply able to give instruction to any twenty students that might have been nominated; that its school was in operation and paying all expenses.

Dr. Barrett was evidently of the opinion that where a will was wholly written and signed by the testator himself, it needed no witnesses. But by the statutes of Missouri, in which state Dr. Barrett resided at the time of making his will and of his death, and by the laws of which its validity must be determined, it was enacted that “every will shall be in writing, signed by the testator or by some person by his direction, in his presence; and shall be attested by two or more competent witnesses, subscribing their names to the will in the presence of the testator”: 2 Mo. Stats., p. 1567, sec. 4. The two wills were presented to the probate court of St. Louis County, Missouri, and upon proper proceedings had thereon they were rejected, and letters of administration were granted upon the estate to the defendant, Richard F. Barrett, who has

also qualified in this state. The foregoing are, in substance, all the facts in the case, and in the light of which the agreement in controversy is to be interpreted. The sole question presented for our determination is, What is the true construction and legal effect of the agreement of the twenty-sixth day of July, 1858?

The respective counsel in this case have most ably and elaborately argued the several questions involved in it. Very much attention was given, in argument, to the discussion of the question whether the paper writing, of date 26th of July, 1858, and upon which the action is based, is a contract or a testamentary instrument. The counsel do not, perhaps, materially differ as to the rule by which this question is to be solved. It is substantially this: If the instrument passes a present interest, although the right to its possession and enjoyment may not accrue till some future time, it is a deed or contract; but if the instrument does not pass an interest or right till the death of the maker, it is a will or testamentary paper.

The counsel for the plaintiff cites the following authorities in support of his construction of the instrument in controversy as a contract, in each of which the instrument construed was held to be a contract or deed, viz.: *Alexander v. Brame*, 35 Eng. L. & Eq. 336; *Robey v. Hannon*, 6 Gill, 463; *Jackson v. Culpepper*, 3 Ga. 569, 573; *Cumming v. Cumming*, 3 Id. 460, 479; *Jaggers v. Estes*, 2 Strob. Eq. 343 [49 Am. Dec. 674]; *McGlaw v. McGlaw*, 17 Ga. 234; *Williams v. Sullivan*, 10 Rich. 219, 223; *Johnson v. McCue*, 34 Pa. St. 180; *Dawson v. Dawson*, Rice Eq. 260; *Mayor etc. of Baltimore v. Williams*, 6 Md. 235, 362; *Bristol v. Warner*, 19 Conn. 7, 18; *Shields v. Irwin*, 3 Yeates, 389; while the counsel for defendant cite the following authorities in support of their construction of the instrument in controversy as a testamentary paper, in each of which the instrument construed was held to be a will, viz.: *Hester v. Young*, 2 Ga. 31; *Kinard v. Kinard*, 1 Speers Eq. 256; *Habergham v. Vincent*, 2 Ves. Jr. 224, 230 x, 235; *Hunt v. Hunt*, 4 N. H. 434 [17 Am. Dec. 438]; *Crawford v. McClay*, 2 Speers Eq. 230; *Greene v. Proud*, 1 Mod. 177, and authorities cited; *Metham v. Duke of Devon*, 1 P. Wms. 529, note y, and authorities cited; *Williams on Executors*, 54-59, and authorities cited.

These authorities are pertinently cited, and have a legitimate bearing upon the case under consideration. They sev-

erally illustrate and verify the rule in substance as above stated, and abundantly prove that each case depends upon its own peculiar facts and circumstances. They further show, what is the experience of every court, that there is less difficulty in ascertaining the rule of law applicable to a class of cases than in the application of the rule to a particular case.

There is another rule or principle of construction applicable to such instruments as to which the counsel in this case are perfectly agreed. It is, that an instrument may be partly a deed and partly testamentary: *Robinson v. Schley*, 6 Ga. 528.

An examination of the cases will show that, in determining the character of the instrument, as to whether it is testamentary or contract, the courts do not allow the use of language peculiar to either class of instruments, nor even the belief of the maker as to its character to control inflexibly their construction of it. But giving due weight to these circumstances, courts look further, and weighing all the language as well as the facts and circumstances surrounding the parties and attending the execution of the instrument, give to it such construction as will effectuate the manifest intention of the maker and parties to it.

Without giving at any length the reasons or argument in support of our construction of the instrument in controversy, we are entirely agreed in holding that the instrument sued upon does not of itself confer any right upon the plaintiff to demand, or any obligation upon the defendant to pay, the twenty thousand dollars; but that the promise to pay two hundred dollars per annum for ten years, commencing January 1, 1861, is a binding contract and promise, and the plaintiff is entitled to recover thereon.

In our view, the language of the instrument, so far as it relates to the twenty thousand dollars, is recitative of a bequest the maker had incorporated in his previous will, and a promise to modify the condition precedent upon which it was made to depend, so far as the time and amount previously to be raised were concerned. In support of this view, we stop only to mention one very controlling fact, and that is, that the twenty thousand dollars is three times spoken of in the latter part of the instrument as a bequest,—not as a promise, agreement, or contract, but as a bequest. The promise refers to the modification of the time and conditions of the payment of the bequest.

As to the consideration to support the promise to pay the

two hundred dollars per annum, we hold, upon the authorities cited by plaintiff's counsel, that it was sufficient: *McDonald v. Gray*, 11 Iowa, 508 [79 Am. Dec. 509].

Under the construction of the instrument as given herein, it becomes wholly unnecessary to determine whether the plaintiff, by the terms of the instrument, was to raise or receive fifty thousand dollars, or only thirty, before it would be entitled to the twenty sued for. So also with the other questions discussed by counsel.

Reversed.

VALIDITY OF WILL, BY WHAT LAW DETERMINED: *Desobats v. Berquier*, 2 Am. Dec. 448, note 454; *Gilman v. Gilman*, 83 Id. 502, note 509; *Peterson v. Chemical Bank*, 88 Id. 298, note 308.

REQUIREMENTS OF STATUTE AS TO WILL HAVING WITNESSES MUST BE SUBSTANTIALLY FOLLOWED, or it will be invalid: *Chaffes v. Baptist etc. Convention*, 40 Am. Dec. 225; *Reynolds v. Reynolds*, 40 Id. 599; note to *Rutherford v. Rutherford*, 43 Id. 646; *Rigg v. Wilton*, 54 Id. 419, note 423; note to *Coffin v. Coffin*, 80 Id. 242; note to *Peck v. Cary*, 84 Id. 241.

IF IT IS DOUBTFUL WHETHER INSTRUMENT IS DEED OR WILL, INTENTION OF PARTIES WILL BE CONSIDERED: *Robertson v. Dunn*, 5 Am. Dec. 525; *Wellborn v. Weaver*, 63 Id. 235.

INSTRUMENT IS CONSIDERED WILL WHEN: *Watkins v. Dean*, 31 Am. Dec. 583; *Johnson v. Yancey*, 65 Id. 646; *Wellborn v. Weaver*, 63 Id. 235; *Babb v. Harrison*, 70 Id. 203; *Evans v. Smith*, 73 Id. 751.

INSTRUMENT IS DEED, AND NOT WILL, WHEN: *Hileman v. Bouslaugh*, 53 Am. Dec. 474; note to *Johnson v. Yancey*, 65 Id. 647; *Babb v. Harrison*, 70 Id. 203.

THE PRINCIPAL CASE WAS CITED in *Craven v. Winter*, 38 Iowa, 478, as furnishing an unerring test to determine whether an instrument is a deed or contract, or a testamentary paper, revocable at the will of the maker. This rule, as stated in the third point of the *syllabus, supra*, was there said to have the united support of the authorities; but as to this, see note, *infra*.

INSTRUMENTS ARE WILLS WHEN, AND WHEN DEEDS OR CONTRACTS. — The distinguishing feature of a will is that it is not to take effect except upon the death of the testator: *Matter etc. of Dix*, 50 N. Y. 93; *Swails v. Bushart*, 2 Head, 563; *Jackson v. Culpepper*, 3 Ga. 569; *Jaggers v. Estes*, 2 Strob. Eq. 343; note to *Johnson v. Yancey*, 65 Am. Dec. 646; but it is not required to be in any particular form: *Armstrong v. Armstrong*, 4 Baxt. 357; S. C., 1 Am. Prob. Rep. 206; *Babb v. Harrison*, 9 Rich. Eq. 111; S. C., 70 Am. Dec. 203; *Habergham v. Vincent*, 2 Ves. Jr. 204; *McGee v. McCants*, 1 McCord, 517; note to *Johnson v. Yancey*, 65 Am. Dec. 647; and it is well settled that where the maker of an instrument thereby intends to dispose of his estate after death, whatever may be its form, it will operate as a will, and be entitled to probate as such, if the obvious purpose is not to take place until after the death of the person making it: *Habergham v. Vincent*, 2 Ves. Jr. 204, 231; *Babb v. Harrison*, 9 Rich. Eq. 11; S. C., 70 Am. Dec. 203; note to *Johnson v. Yancey*, 65 Id. 647; *In Goods of Knight*, 2 Hagg. Eco. 554; *Robinson v. Schly*, 6 Ga. 527; *Jaggers v. Estes*, 2 Strob. Eq. 343; *McGee v. McCants*, 1.

McCord, 517; *Belcher's Will*, 66 N. C. 51; *Patterson v. English*, 71 Pa. St. 454; *Wilbur v. Smith*, 5 Allen, 194; *Leathers v. Greenacre*, 53 Mo. 561; *Dunn v. Bank of Mobile*, 2 Ala. 152; *Walker v. Jones*, 23 Id. 448; *Mosser v. Mosser's Ex'r*, 32 Id. 551; *Jackson v. Jackson's Adm'r*, 6 Dana, 257; *Succession of Ehrenberg*, 21 La. Ann. 280; *Wood, Estate of*, 36 Cal. 75; *Olingan v. Mitchell*, 31 Pa. St. 25; *Lyles v. Lyles*, 2 Nott & McC. 531; *Symmes v. Arnold*, 10 Ga. 506; *Rose v. Quick*, 30 Pa. St. 225; *Wheeler v. Durant*, 3 Rich. Eq. 452; *Means v. Means*, 5 Strob. 167; *Millican v. Millican*, 24 Tex. 426; *Carey v. Dennis*, 13 Md. 1. Of course, the intention of the maker to dispose of his estate after death must be lawful in itself, and the writing must have the statutory formalities, where required, to make it operate as a will: *Babb v. Harrison*, 9 Rich. Eq. 111; S. C., 70 Am. Dec. 203; for a paper imperfectly executed may fail to be of any significance whatever. It may be deduced from the authorities that if there is proof, either in the paper itself or from clear outside evidence, that it was the maker's intention to convey benefits by the instrument which would be conveyed by it if considered as a will; and that death was the event that was to give it effect; then whatever may be its form, it may be admitted to probate as testamentary: See numerous cases cited above; *Gage v. Gage*, 12 N. H. 371; *Symmes v. Arnold*, 10 Ga. 506; *Wheeler v. Durant*, 3 Rich. Eq. 452; *Singleton v. Brennar*, 4 McCord, 12; *Ingram v. Porter*, 4 Id. 198. Thus writings of the following character have been admitted to probate:—

1. *Promissory Notes*: *Masterman v. Maberly*, 2 Hagg. Ecc. 247; *Wilbur v. Smith*, 5 Allen, 194. These cases refer to promissory notes in the usual form, with evidence that the deceased intended them to be paid only at his death. An indorsement upon a note, "I give this note to A," may be proved as testamentary: *Chaworth v. Beech*, 4 Ves. 555. And a note indorsed, "If I am not living at the time this note is paid, I order the contents to be paid to A. H.," was admitted to probate as a will: *Hunt v. Hunt*, 4 N. H. 434; S. C., 17 Am. Dec. 438; *Jackson v. Jackson*, 6 Dana, 257. But a note found in an envelope, with a letter stating that it was for the payee's faithful services, was viewed as a legacy, but not admitted to probate, as it was not attested according to the statute: *Gough v. Findon*, 7 Ex. 48; *Mitchell v. Smith*, 4 De Gex, J. & S. 422; and in *Bristol v. Warner*, 19 Conn. 7, the instrument was held to be a promissory note, negotiable and irrevocable. It was in these words: "On demand, after my decease, I promise to pay B. or order \$850, without interest," and was delivered to B. as evidence of the maker's indebtedness to him: See *Plumstead's Appeal*, 4 Serg. & R. 544; *Passmore v. Passmore*, 1 Phillim. 216.

2. *Bonds*. — An assignment of a bond by indorsement has been admitted to probate: *Musgrave v. Donn*, cited in *Masterman v. Maberly*, 2 Hagg. Ecc. 247; a bond expressed to be payable out of the general fund of the obligor's estate at his death: *Johnson v. Yancey*, 20 Ga. 707; and a like instrument absolute in form, but placed in the hands of a third person, to be delivered by him to the obligee only on the death of the obligor: *Carey v. Dennis*, 13 Md. 1.

3. *Powers of Attorney*. — A power of attorney authorizing certain persons to administer on the maker's estate, and to sell and dispose of the proceeds as they shall think proper for the greatest benefit of the heirs, is a good will: *Rose v. Quick*, 30 Pa. St. 225. So is a like power authorizing the donee to hold and retain to his own use certain property until the donor should return from a foreign land, and assigning and transferring such property to the donee in case the donor died before such return: *Cross v. Cross*, 8 Q. B. 714.

4. *Checks, Bills of Exchange, etc.* — Checks, with entries in the check-book

that they were drawn "for fear anything should happen that I should die," have been pronounced 'codicillary: *Bartholomew v. Henley*, 3 Phillim. 317. And a bill of exchange signed in the presence of witnesses, and propounded as a codicil, was admitted to proof: *Jones v. Nicolay*, 2 Rob. Ecc. 288. So administration was granted upon orders on a savings bank signed in the presence of witnesses: *In re Marsden*, 1 Swab. & T. 542.

5. *Diaries, Entries in Account-books, Memoranda.* — Entries in a continuous diary, purporting to make a disposition of the writer's property, after death may be probated as a will: *Reagan v. Stanley*, 11 Lea, 316. So with script written in a book of accounts: *Brown v. Eaton*, 91 N. C. 26. A memorandum may be made a will by the act of God: *Booster v. Rogers*, 9 Gill, 44; S. C., 52 Am. Dec. 680; and a paper may be made a will by adoption, although not such at the time it was written: *Id.* So a memorandum in a paper in the following words: "The above-named bonds were restored by A, and are placed in the hands of B, in trust, for the use of C after my decease," was held to be testamentary, notwithstanding a delivery of the bonds had taken place, and in the donor's last illness: *Tapley v. Kent*, 1 Rob. Ecc. 400.

6. *Receipts for Stock, Certificates of Deposit.* — Receipts for stock have been held testamentary: *Drybutter v. Hodges*, cited in *Masterman v. Maberly*, 2 Hagg. Ecc. 247. But the attempted transfer of a certificate of deposit on the donor's death-bed cannot be enforced as a will of personalty, where the statute does not allow such a will to take effect until probate: *Basket v. Hassell*, 108 U. S. 267.

7. *Contracts.* — Instruments in the form of articles of agreement have been held testamentary: *Castor v. Jones*, 86 Ind. 289; S. C., 3 Am. Prob. Rep. 148; as marriage articles: *Marnell v. Walton*, 2 Hagg. Ecc. 247; a Scotch settlement: *Hogg v. Lashley*, 3 Id. 415, note; an instrument headed, "Matrimonial and Testamentary Agreement," notwithstanding it may have been executed in pursuance of a previous promise or obligation appearing on its face: *Will of Diez*, 50 N. Y. 88. But an antenuptial agreement has been refused probate, *Michael v. Baker*, 12 Md. 158, S. C., 71 Am. Dec. 593, as not being a testamentary paper. So with a contract deemed to be within the statute of frauds: *Johnson v. McCue*, 34 Pa. St. 180.

8. *Letters.* — Instruments in the form of letters have been admitted to probate as wills: *Manly v. Lakin*, 1 Hagg. Ecc. 130; *In Goods of Dunn*, 1 Id. 488; *Drybutter v. Hodges*, cited in *Masterman v. Maberly*, 2 Id. 247; *Passmore v. Passmore*, 1 Phillim. 216; *Denny v. Barton*, 2 Id. 575; *In Goods of Parker*, 2 Swab. & T. 375; *In Goods of Mundy*, 2 Id. 119; *Leathers v. Greenacre*, 53 Me. 561; *Cowley v. Knapp*, 42 N. J. L. 297; S. C., 1 Am. Prob. Rep. 390. Thus a writing by deceased, over his signature, on the back of a business letter, ending: "And, Ann, after my death, you are to have forty thousand dollars; this you are to have, will or no will; take care of this until my death," — constitutes a valid will of personalty: *Byers v. Hoppe*, 61 Md. 206; S. C., 4 Am. Prob. Rep. 218; 48 Am. Rep. 89. But, of course, a letter purporting to convey property must do it in conformity with law, or it will, though testamentary in character, fail to operate as a will: *Grattan v. Appleton*, 3 Story C. C. 755; *Todd's Will*, 2 Watts & S. 145; *Wagner v. McDonald*, 2 Har. & J. 346; *Gibson v. Van Syckle*, 47 Mich. 439. It is necessary that the letter should have been designed to operate as a disposition of the maker's property; the intention to make a will must be manifest; and there must be a corpus upon which a will can operate, in order to make a letter constitute a will: *McBride v. McBride*, 26 Gratt. 476; *Succession of Elliot*, 27 La. Ann. 44;

and where it is proved that the deceased did not suppose that a letter would constitute his will, the instrument has been refused probate as such: *McGee v. McCanta*, 1 McCord, 320.

9. *Miscellaneous Writings Probated as Wills*: *Clingan v. Mückeetree*, 31 Pa. St. 25; *French v. French*, 14 W. Va. 458; *Fosselman v. Elder*, 98 Pa. St. 159; *Kelleher v. Kernan*, 60 Md. 440; S. C., 3 Am. Prob. Rep. 417; *Toebbe v. Williams*, 80 Ky. 661; S. C., 3 Am. Prob. Rep. 333; *Singleton v. Bremar*, 4 McCord, 12; S. C., 17 Am. Dec. 699; *Lucas v. Parsons*, 24 Ga. 640; S. C., 71 Am. Dec. 147; *Evans v. Smith*, 28 Ga. 98; S. C., 73 Am. Dec. 751. The words, "I give at my death," are operative words, and evidence of testamentary intent: *Belcher's Will*, 66 N. C. 51. An instrument commencing, "Know all men by these presents," and ending, "This conveyance to have effect from and after my death," is a will: *Armstrong v. Armstrong*, 4 Bart. 357; S. C., 1 Am. Prob. Rep. 206. And the following instrument: "I wish five thousand dollars to go to John C. Cole in the event of my dying intestate, and the balance of my property to go to Robert Beatie, to be disposed of by him as his judgment may dictate," if properly executed and witnessed, is testamentary in its character, and is a will: *Estate of Wood*, 36 Cal. 75.

10. *Miscellaneous Writings Rejected from Probate*. — A writing on a slate: *Reed v. Woodward*, 11 Phila. 541; an agreement that at the testator's death L. shall be his lawful heir "of all the land he now owns," and agreeing, in consideration of certain services to be rendered by L. during testator's lifetime, to give up possession of certain personalty: *Evans v. Lauderdale*, 10 Lea, 73; a paper written and signed in pencil, in a merchant's memorandum-book, in disjointed items, without words of gift, etc.: *Patterson v. English*, 71 Pa. St. 454. A conveyance left in escrow till the grantor's death, or containing a direction that it shall not be "deliverable" till that event happen: *Stewart v. Stewart*, 5 Conn. 317; *Belden v. Carter*, 4 Day, 66; *Wheelwright v. Wheelwright*, 2 Mass. 447; *McGlawn v. McGlawn*, 17 Ga. 234; for a will is not a subject of escrow: *Sewell v. Slingluff*, 57 Md. 538. So an agreement for a lease which directs a certain disposition to be made in the event of the lessor's death before its termination is not a will: *In Goods of Robinson*, L. R., 1 P. & D. 384. For other cases on this head, see *Cranford v. McKibby*, 2 Speers, 225; *Crutcher v. Crutcher*, 11 Humph. 376; *Shields v. Irwin*, 3 Yeates, 389; *McCarty v. Waterman*, 84 Ind. 550.

11. *Instruments in Form of Deeds have been Probated as Wills*: *Carlton v. Cameron*, 54 Tex. 72; S. C., 38 Am. Rep. 620, and extended note thereto showing when a deed is operative only as a will; *Miller v. Holt*, 68 Mo. 584; S. C., 1 Am. Prob. Rep. 199, and extended note thereto showing what form of instruments have been held testamentary in character; *Jaggers v. Eide*, 2 Strob. Eq. 343; *Singleton v. Bremar*, 4 McCord, 15; *Ingram v. Porter*, 4 Id. 198; *Watkins v. Dean*, 10 Yerg. 320; S. C., 31 Am. Dec. 583, note 585; *Hester v. Young*, 2 Ga. 31; *Jordan v. Jordan*, 65 Ala. 301; *Sperber v. Balster*, 66 Ga. 317; *In Goods of Knight*, 2 Hagg. Ecc. 554; *Babb v. Harrison*, 9 Rich. Eq. 111; S. C., 70 Am. Dec. 203; *Evans v. Smith*, 28 Ga. 98; S. C., 73 Am. Dec. 751; *Wellborn v. Weaver*, 17 Ga. 267; S. C., 63 Am. Dec. 646; *Johnson v. Yancey*, 20 Ga. 707; S. C., 65 Am. Dec. 646; *Symmes v. Arnold*, 10 Ga. 506; *Dunn v. Bank of Mobile*, 2 Ala. 152; *Walker v. Jones*, 23 Id. 448; *Millican v. Millican*, 24 Tex. 426; *Mosser v. Mosser's Ex'r*, 32 Ala. 551; *Gage v. Gage*, 12 N. H. 371; *Turner v. Scott*, 51 Pa. St. 126; *Shepherd v. Nabors*, 6 Ala. 631; *Fredrick's Appeal*, 52 Pa. St. 338; *Bright v. Adams*, 51 Ga. 239; *Wheeler v. Durant*, 3 Rich. Eq. 452; *Milledge v. Lamar*, 4 Desaus. Eq. 617; *Ragsdale v. Booker*, 2 Strob. Eq. 348, note; *Sartor v. Sartor*, 39 Miss. 760; *Belcher's Will*, 66 N. C.

51; *Dudley v. Mallory*, 4 Ga. 52; *Golding v. Golding*, 24 Ala. 122; *Hall v. Bragg*, 28 Ga. 330; *Nichols v. Chandler*, 55 Id. 369; *Watkins v. Dean*, 16 Yerg. 321; *In re Morgan*, L. R. 1 Pro. & D. 214. These cases sustain the test laid down in the principal case for determining whether an instrument is a will or a contract.

12. *Instruments in Form of Deeds Which have been Rejected from Probate as Wills*, and showing when a deed should not be considered a will: *Hileman v. Bouslaugh*, 13 Pa. St. 344; S. C., 53 Am. Dec. 474; note to *Watkins v. Dean*, 31 Am. Dec. 585; *Babb v. Harrison*, 9 Rich. Eq. 111; S. C., 70 Am. Dec. 203; extended note to *Armstrong v. Armstrong*, 1 Am. Prob. Rep. 208-210, showing what form of instruments are held testamentary in character; *Williams v. Tolbert*, 66 Ga. 127; *Estate of Skerrett*, 67 Cal. 585; *Jagers v. Estes*, 2 Strob. Eq. 343; *Duke v. Dyches*, 2 Id. 353; extended note to *Carlton v. Cameron*, 38 Am. Rep. 621, showing when a deed will not be considered a will; *Mayor etc. v. Williams*, 6 Md. 235; *Gage v. Gage*, 12 N. H. 371; *Will of Dies*, 50 N. Y. 93; *Jackson v. Culpepper*, 3 Ga. 569; *Cumming v. Cumming*, 3 Id. 460; *Swails v. Bushart*, 2 Head, 561; *Wall v. Ward*, 2 Swan, 647; *Golding v. Golding*, 24 Ala. 122; *Bass v. Bass*, 52 Ga. 531; *Robey v. Hannon*, 6 Gill, 463; *Robinson v. Schly*, 6 Ga. 527; *Edwards v. Smith*, 35 Miss. 197; *Alexander v. Brame*, 35 Eng. L. & Eq. 336.

13. *Tests for Determining whether Instrument is Deed or Will*. — In support of the test laid down in the principal case, it may be here remarked that the distinction between a will and a deed is, that a will has no operation until the death of the testator, and that a deed must take effect on its execution, and immediately pass the estate or interest given, although it is not essential that this interest shall immediately pass into the possession of the donee: *Babb v. Harrison*, 9 Rich. Eq. 111; S. C., 70 Am. Dec. 203. The main question is, Does the instrument, regardless of its form, pass a present interest? If it does, it is a deed; otherwise not: *Robinson v. Schly*, 6 Ga. 527. If the instrument is to be consummated by death only, effect will be given to it as a will, and not as a deed. And in determining whether an instrument be a deed or a will, it must be ascertained whether the maker intended to convey any estate or interest whatever, to vest before his death and upon the execution of the paper; or, on the other hand, whether he intended that all the interest and estate should take effect only at his death: *Gillman v. Mustin*, 42 Ala. 365. In *Jordan v. Jordan*, 65 Id. 301, the test laid down is this: in determining whether an instrument is a deed or a will, when it is properly executed to operate as either, it is not material what it is called on its face, nor how it was received and acted on by the parties claiming under it; the material inquiry is as to the effect and operation which the maker intended it to have; and if his intention as collected from the terms of the instrument, when read in the light of surrounding circumstances at the time of its execution, was that it should not take effect until after his death, should not convey any vested right or interest, but should be revocable during his life, it is testamentary in its nature, and can only operate as a will. In support of these doctrines, see principal case; *In Goods of Knight*, 2 Hagg. Ecc. 554; *Will of Dies*, 50 N. Y. 93; *Millican v. Millican*, 24 Tex. 426; *Jackson v. Culpepper*, 3 Ga. 569; *Cumming v. Cumming*, 3 Id. 460; *Hileman v. Bouslaugh*, 13 Pa. St. 344; S. C., 53 Am. Dec. 474; *Swails v. Bushart*, 2 Head, 561; *Evans v. Smith*, 28 Ga. 98; S. C., 73 Am. Dec. 751; *Stevenson v. Huddleston*, 13 B. Mon. 299; *Habergham v. Vincent*, 2 Ves. Jr. 204; *Gage v. Gage*, 12 N. H. 371; *Mosser v. Mosser's Ex'r*, 32 Ala. 551; *Thompson v. Johnson*, 19 Id. 59; *Shepherd v. Nabors*, 6 Id. 631; *Edwards v. Smith*, 35 Miss. 197; *Walker*

v. *Jones*, 23 Ala. 448; *Crain v. Crain*, 17 Tex. 80; S. C., 21 Id. 790; *Hart v. Rust*, 46 Id. 556; *Ritter's Appeal*, 59 Pa. St. 9; *Hall v. Burkham*, 59 Ala. 349. An instrument may be a deed in part and a will in part: *Robinson v. Schly*, 6 Ga. 515; but the same instrument cannot operate both as a deed and as a will: *Thompson v. Johnson*, 19 Ala. 59. As wills now generally require attestation by two or more witnesses, the validity of an instrument as an actual disposition of property would, if not so attested, depend on the maintenance of its non-testamentary character: *Mitchell v. Smith*, 33 L. J., N. S., 596.

14. *Test in Doubtful Cases between Will and Some Other Instrument — General Principles — Intention — Evidence — Animus Testandi*: See principal case, and cases cited under preceding head. It is the *animus testandi* in general which makes any instrument a will, or *vice versa*: *Crutcher v. Crutcher*, 11 Humph. 386; *Booster v. Rogers*, 9 Gill, 44; S. C., 52 Am. Dec. 680; *McGee v. McCants*, 1 McCord, 517; *Combs v. Jolly*, 3 N. J. Eq. 625. As laid down in *McBride v. McBride*, 26 Gratt. 481, it is necessary that the instrument, whatever it may be, whether note, deed, letter, or settlement, should have been designed to operate as a disposition of the maker's property. The identical paper must have been intended to take effect in some form. It must have been written *animus testandi*. But it is sometimes hard to discover whether, technically speaking, a disposition of property was testamentary or not; and in all probability the disposer himself had no clear opinion on that point. The transaction itself is seen to be testamentary in character or the reverse, for there is no middle ground; and as this is the transaction the maker intended, his instrument is declared a will or some other instrument accordingly. Even though he could be shown to have intended it as a will, and attested it as such, this would not avail as against the actual transaction; and so *vice versa*. In other words, whether the maker would have called his instrument a deed or something else is one question; whether it shall operate as a deed or a will is a distinct question; that is to be governed by the provisions in the instrument. Whether a writing therefore is a will depends upon its contents, and not upon any declaration of the maker that it is a will when he executes it. And this does not conflict with the rule that courts will give effect to the intention of the maker. Such intention is collected from the terms of the instrument when clear, and from outside evidence, if the instrument is vague. In support of these propositions, see *Jordan v. Jordan*, 65 Ala. 301; *McGee v. McCants*, 1 McCord, 517; *Patterson v. English*, 71 Pa. St. 454; *Hester v. Young*, 2 Ga. 31; *Putts v. Mangum*, 2 Bail. 588; *Walker v. Jones*, 23 Ala. 448, 456; *Robertson v. Dunn*, 2 Murph. 133; S. C., 5 Am. Dec. 525; *Edwards v. Smith*, 35 Miss. 197; *Dawson v. Dawson*, Rice Eq. 260; *Lyles v. Lyles*, 2 Nott & McC. 531; *Habergham v. Vincent*, 2 Ves. Jr. 204, 231; *Gage v. Gage*, 12 N. H. 371.

An instrument, however, is not bound to be called a will because inoperative as something else: *Edwards v. Smith*, 35 Miss. 197. There are several methods of coming at the intention of the maker of an instrument: 1. Where it is expressed on the face of the writing; 2. Where the paper is in the form of a deed, letter, memorandum, or other form, containing an actual disposition of his estate to take effect after his death, and though not a will in form, is so in its effects and operation; 3. When the intention is doubtful, as expressed on the face of the paper, and must be found out by parol proof: *McGee v. McCants*, 1 McCord, 517. Parol evidence is, of course, not admissible to dispute the plain tenor of an instrument. Thus where in both form and substance the writing is plainly a will, and execution with all the prescribed

formalities can be shown, its obvious intent and scope cannot be contradicted or controlled in its operation by parol and extrinsic evidence: *Whyte v. Pollok*, 7 App. Cas. 400; *Sewell v. Slingsuff*, 57 Md. 537; *In Goods of English*, 3 Swab. & T. 586. If, on the other hand, an instrument expressed and executed as a deed be delivered *inter vivos* to the party who on its face appeared entitled to it, no agreement in conflict with its plain tenor can be proved, after the maker's death, to show that its operation was testamentary, or dependent on some condition subsequent: *Black v. Shreve*, 2 Beal. 458; *In Goods of Dary*, 1 Swab. & T. 262. Where, however, something to suggest a doubt as to whether the instrument was intended to be testamentary or not appears on the face of it, extrinsic evidence as to the circumstances, besides the fact of execution, is admissible so as to enable the court to determine the true character of the instrument: *Evans v. Smith*, 28 Ga. 98; S. C., 73 Am. Dec. 751; *Herrington v. Bradford*, Walk. Ch. 520; *Gage v. Gage*, 12 N. H. 371; *Robertson v. Smith*, L. R. 2 Pro. & D. 43; *Cock v. Cooke*, L. R. 1 Pro. & D. 241; *Jones v. Nicolay*, 2 Rob. Ecc. 292; *Whyte v. Pollok*, L. R. 7 App. Cas. 400; *In Goods of English*, 3 Swab. & T. 586. And this does not throw upon the propounder a burden of proof which he fails to satisfy if the evidence does not confirm the instrument as a will; but the natural consequence is, that the court will fall back upon the instrument itself, and apply sound principles of construction to arrive at its real character, just as it would in interpreting any other document: *Whyte v. Pollok*, L. R. 7 App. Cas. 400, 406.

WARNER v. BURLINGTON AND MISSOURI RIVER RAILROAD.

[22 IOWA, 166.]

COMPLAINT STATING FACTS, AND CHARGING RAILROAD COMPANY GENERALLY FOR LOSS OF BAGGAGE, IS GOOD; and if the company is liable, either in the capacity of common carrier or as warehouseman, the plaintiff is entitled to recover.

RAILROAD COMPANY IS LIABLE AS WAREHOUSEMAN FOR LOSS OF BAGGAGE, where it receives and undertakes to convey a passenger's trunk by a subsequent train to a given point, but puts it in the common passenger-room at the place of destination, instead of the baggage-room kept for that purpose, where it is broken open by burglars and rifled of its contents before the passenger has a reasonable time, after its arrival, in which to receive it.

PASSENGER HAS REASONABLE TIME AFTER ARRIVAL OF BAGGAGE SENT ON SUBSEQUENT TRAIN IN WHICH TO RECEIVE IT; and even if the liability of the railroad company ceases, unless the passenger exercises the utmost watchfulness in calling for his baggage, it would still be liable as a warehouseman, at least for a reasonable time.

IF RAILROAD COMPANY, BY ITS AGENT, ACCEPTS AND UNDERTAKES TO CARRY AND DELIVER PASSENGER'S TRUNK ON SUBSEQUENT TRAIN, IT IS LIABLE, whether the agent had the authority or not, in the first instance, to bind the company by the agreement to obtain and forward the baggage. The agent's failure to forward the trunk might not make the company liable in case of loss, but it would be liable after assuming the responsibility of carrying it.

WHERE PASSENGER PAYS HIS FARE, AND RAILROAD COMPANY, BY ITS AGENT, UNDERTAKES TO DELIVER HIS TRUNK BY SUBSEQUENT TRAIN, the company takes upon itself the ordinary liabilities that are assumed by such companies when the passenger goes upon the same train.

SAME RULES OF CARE AND DILIGENCE ON PART OF RAILROAD COMPANY APPLY WHETHER BAGGAGE IS FORWARDED ON SAME, PRECEDING, OR SUBSEQUENT TRAIN, where the passenger has paid his fare, and his baggage is sent forward pursuant to an agreement, and as a part of the consideration moving from the company for the fare prepaid by the passenger.

PLAINTIFF took a ticket, paid for it, and became a passenger on defendant's road from Ottumwa to Fairfield. On starting, he found his trunk locked up in the baggage-room of the Des Moines Valley Railroad, for which he held its check. Not being able to get it, defendant's agent took the check held by plaintiff, telling plaintiff to proceed to Fairfield, and he would forward his trunk by the next train. Plaintiff proceeded to Fairfield, and on the next day applied for his trunk, but it had not come; the second day he sent to the depot for it, with the same result. On the third day he sent again, and received word that it was there, and broken open. He called on the fourth day, and found that the trunk had been broken open, and its contents taken. It had been locked up in the common passenger-room. The windows were nailed down, but had been forced up by means of a chisel. There was a small room for baggage off the ladies' sitting-room, but the trunk was not put into it. The trunk was broken open in the common passenger-room. The case was originally tried before a justice of the peace. Plaintiff claimed ninety dollars, and in his petition gave the items and value of the articles in his trunk. Defendant, in its answer, alleged that plaintiff's trunk was stored in defendant's station-house, "a reasonably safe place to store the same," because plaintiff was not at Fairfield when his trunk arrived to receive it. There was judgment for plaintiff, and defendant appealed to the district court. In the last-named court, a jury being waived, there was a finding for plaintiff. Defendant excepted, and appealed.

D. Rover, for the appellant.

D. P. Stubbs, for the appellee.

By Court, WRIGHT, J. This case is not like *Porter v. Chicago etc. R. R. Co.*, 20 Iowa, 73. There it was clear that the plaintiff in his petition claimed against defendant as a warehouseman, while the instructions held the company to the

stricter obligations of a common carrier. Here the petition charges the defendant generally; not as common carriers nor as warehousemen distinctively. He states the facts, and if in either capacity the company is liable, the plaintiff is entitled to recover. The proceeding was commenced before a justice of the peace, and the petition is more formal and specific than is usually found in these inferior tribunals. If the defendant desired greater particularity or precision, more definite knowledge of plaintiff's claim, this might have been obtained by a motion for a more specific statement. But as the case stood, the court could find against the defendant, whether liable as common carriers or warehousemen. Which view was taken of the case, we have no means of knowing. It is sufficient for us to say that if the defendant was held to the care and diligence of a warehouseman only, the testimony warranted the finding. That is to say, taking all the facts into the account, remembering that the trunk was not deposited in its proper place; that it was left over night in a common room; that this was broken into by some one,—whether by those engaged about the building or by strangers, does not appear; that there is no evidence of effort to discover the burglars, and we cannot say the court below erred in finding for plaintiff. Whether the testimony warranted the conclusion that the relation of common carrier still continued, we need not discuss. But see *Smith v. Nashua etc. R. R. Co.*, 27 N. H. 86 [59 Am. Dec. 364]; Redfield on Railways, secs. 129, 130.

But it is insisted that it was out of the line of duty of the station agent at Ottumwa to receive plaintiff's check and undertake to get his baggage; that the ordinary undertaking to transport the baggage in consideration of the fare paid only applies in cases where the baggage goes with the passenger; that if sent alone there was no consideration for carrying the same, and that it was the duty of plaintiff to be at the station at Fairfield to receive his baggage.

At what time in the day or night before the trunk was broken open it reached Fairfield, does not appear. Plaintiff had a right to a reasonable time after its arrival within which to receive it. And if it be held that unless the passenger exercised the utmost watchfulness in calling for his trunk, the responsibility of defendant as a common carrier was at an end, it would still be liable as a warehouseman, at least for a reasonable time.

Then we do not see that it makes any difference whether it

was or was not the duty of the agent at Ottumwa, in view of his relation to the company, to forward the baggage. The loss did not occur at Ottumwa, nor before it was placed in defendant's charge. The trunk was intrusted to the care of defendant's admitted agents, and while under their control was rifled of its contents; and it was placed there pursuant to a previous request and agreement.

The consideration paid for carrying the owner was sufficient for transporting the trunk, whether on the same or a subsequent train. The case is not like one where the trunk was sent without anything being paid, either as the fare of the owner or passenger, or otherwise; nor as though it had been placed upon the train without notifying any one employed thereon of the fact. It may be conceded that the undertaking of the agent at Ottumwa to obtain and forward the trunk was not binding on the company; in other words, had he failed to discharge this duty, and loss had occurred, that plaintiff would have had no remedy against defendant.

But this is an immaterial inquiry in the present case. The company accepted and undertook to convey and deliver this baggage; and it is of the failure to do this that plaintiff complains. And having paid his fare, the defendant, by undertaking, pursuant to the agreement of its agent, to deliver this baggage by a subsequent train, assumed the ordinary liability of such companies where the passenger and baggage go upon the same train. There is no reason for the distinction claimed. The owner, if on the train, does not, and is not required, and very often, as is known, will not be allowed, to exercise any control over his baggage after being placed in the appropriate car. And whether on the same, the preceding, or the next train, if the baggage goes or is sent pursuant to an agreement, and as a part of the consideration moving from the company for the fare paid by the passenger, we cannot see why the same rules as to care and diligence do not apply: *Logan v. Pontchartrain R'y*, 11 Rob. (La.) 24 [43 Am. Dec. 199]. In that case, the passenger did not accompany his baggage, but went in another train: *Pierce's Railroad Law*, 425. And see also, on the questions here discussed, *Jordan v. Fall River R. R. Co.*, 5 Cush. 69 [51 Am. Dec. 44]; *Merriam v. Hartford etc. R. R. Co.*, 20 Conn. 354 [52 Am. Dec. 344]; *Platt v. Hibbard*, 7 Cow. 497; *Moses v. Boston etc. R. R. Co.*, 24 N. H. 71 [55 Am. Dec. 222]; *Camden etc. R. R. Co. v. Belknap*, 21 Wend. 354; *Redfield on Railways*, sec. 128.

Affirmed.

LIABILITY OF RAILROAD COMPANY FOR LOSS OF BAGGAGE: See note to *Minor v. Chicago etc. R'y Co.*, 88 Am. Dec. 672; note to *Hollister v. Nowlen*, 32 Id. 469; *Logan v. Pontchartrain R. R. Co.*, 43 Id. 199; *McGill v. Rowand*, 45 Id. 654.

FOR VARIOUS QUESTIONS CONCERNING BAGGAGE, see *Owmit v. Henshaw*, 84 Am. Dec. 646, note 658, showing that the act of the agent of a railroad company concerning baggage is the act of the company; that the delivery of baggage to the servant of a railroad company is sufficient to charge the company; and that a railroad company's liability respecting a passenger's baggage is that of a common carrier. This case also shows the duty of the company respecting the safe-keeping of baggage, and the owner's duty to call for it within a reasonable time.

HALLETT v. CHICAGO AND NORTHWESTERN RAILWAY COMPANY.

[22 IOWA, 259.]

JURAT OF AFFIDAVIT OFFERED IN EVIDENCE MAY BE AMENDED by adding thereto a reference to the notarial seal of the notary before whom the affidavit was made, which reference was omitted in the original *jurat*; and the effect of such amendment is to make the affidavit relate back to and have full effect from its date.

OMISSION OF CLERK, IN HIS ATTESTATION OF WRIT, TO REFER TO SEAL OF COURT AFFIXED THERETO, MAY BE AMENDED in the particular complained of, so as to make the writ relate back to and have full effect from its date.

ACTION to recover damages for the alleged killing of a mare by the defendant. Judgment for plaintiff, and defendant appealed. Other facts are stated in the opinion.

Green and Belt, for the appellant.

Stivers and Cary, for the appellee.

By Court, COLE, J. On the trial, the plaintiff offered in evidence his affidavit of killing of the mare by the defendant, together with notice of service thereof on one of its ticket agents, as provided by chapter 169, act of 1862. This affidavit was sworn to before a notary public, and was authenticated by both the signature and seal of the notary; but there was no reference to his notarial seal in the *jurat*. The defendant objected to its introduction as evidence, for the reason that there was no reference to the notarial seal in the *jurat*. The court sustained the objection, but allowed the notary to amend his *jurat* in that particular; and after such amendment, permitted the plaintiff to introduce the same in evidence upon

the terms of paying all costs except filing fee. To this ruling the defendant excepted, and thereon arises the only question presented for our decision in this case.

It was held by the court in *Riggs v. Bagley*, 2 G. Greene, 383, that the omission of the clerk, in his attestation of a writ, to refer to the seal of the court, which was affixed thereto, was a technical defect which might properly be amended. If a writ whereon, and the proper service thereof, the jurisdiction of the court rests, may be amended in the particular complained of, so as to relate back to and have full effect from its date, it would seem, *a fortiori*, that an affidavit may very properly be amended in the same particular and with like effect. See also, as to amendments of affidavits, *Bunce v. Reed*, 16 Barb. 347; *Hees v. Snell*, 8 How. Pr. 185, and note; *Spalding v. Spalding*, 3 Id. 297; *Freeman v. Walter*, 13 Id. 384. In the case of *Tunis v. Withrow*, 10 Iowa, 305 [77 Am. Dec. 117], there was no signature or seal to one affidavit, and no seal to the other. So, also, in *Chase v. Street*, 10 Id. 593. See also Revision, sec. 4119.

We do not wish to be understood as holding that the omission to refer to the seal in the *jurat* was such a defect as to require its rejection, as ruled by the district court: See Revision, sec. 4037. If there was error, however, in that ruling, as we are inclined to hold there was, it was not to appellant's prejudice.

Affirmed.

AMENDMENT OF WRITS, WHERE DEFECTIVE FROM WANT OF SEAL: See somewhat extended note to *Woolford v. Dugan*, 35 Am. Dec. 53; *Foss v. Iselt*, 61 Id. 117, note 118; *Jump v. Batton's Creditors*, 86 Id. 146; *Durham v. Heaton*, 81 Id. 275.

AMENDMENT OF AFFIDAVITS: See *Tunis v. Withrow*, 77 Am. Dec. 117, note 119.

THE PRINCIPAL CASE WAS CITED IN *Jones v. Berryhill*, 25 Iowa, 294, to the point that it is not necessary that a notary's certificate of protest should have annexed to it, or set out therein, the notices referred to in the certificate; nor that the certificate should in words formally refer to the seal. An objection that the seal is not referred to will not avail where the notary adds, in brief, "*In testimonium veritatis*," and the certificate is followed by the name of the officer in his official character, with his seal of office.

MOOMEY v. MAAS.

[22 IOWA, 330.]

FORECLOSURE OF MORTGAGE IN WHICH WIFE DID NOT JOIN, AND SALE THEREUNDER, DOES NOT BAR HER RIGHT OF DOWER in the mortgaged premises, although she is made a party defendant in the foreclosure proceeding, but in which her right of dower is not put in issue. *Aliter*, if the wife had joined in the mortgage, or her right to dower had been put in issue by allegations in the petition.

ON APPEAL IT WILL BE HELD THAT, UNLESS THERE WAS COMPLETE SERVICE UPON MINORS, the court below has no jurisdiction to appoint a guardian *ad litem*, or to make any order prejudicial to their rights.

PURELY TECHNICAL DEFECT IN RETURN OF SERVICE OF NOTICE IN FORECLOSURE PROCEEDING UPON MINOR HEIRS OF DECEASED MORTGAGOR, does not make the foreclosure decree, and sale thereunder, void, though the return might have been pronounced defective on appeal; and such decree and sale cannot be invalidated on account of such defect, in a collateral proceeding instituted by such heirs to redeem the mortgaged premises, especially when several years have elapsed since the sale, and there are no supporting equities in the case.

EXECUTION SALE MAY BE MADE AFTER RETURN DAY, OR AFTER WRIT HAS EXPIRED, where a valid execution was levied on real estate before the return day. A new execution is not necessary.

THIS cause involved the validity and effect of a certain prior foreclosure proceeding, and sheriff's sale thereunder. The plaintiff Maria Moomey was the widow of her former husband, Daniel Talbott. Her co-plaintiff, Pundt, claimed by deed under her. The other plaintiffs were the heirs at law of the said Daniel Talbott, deceased. The defendant Roberts was a mortgagee of the said Daniel, and the purchaser at the foreclosure sale referred to *infra*. His co-defendant, Maas, was a subsequent purchaser of the land from him. In 1857 Talbott executed to Roberts a mortgage on the land in controversy. In 1858 Talbott died, and left surviving him Maria, his widow, who afterwards intermarried with Moomey, and six minor children. One of the children afterwards died intestate, leaving his mother his sole heir at law. One Hunter was appointed administrator of Talbott's estate. In 1859 Roberts commenced a suit to foreclose his mortgage, and made Hunter, Maria, and all the minor children defendants, upon all of whom personal service was obtained. The original notice was in due form, but the return of service on said notice omitted to say that Maria, who was served as well as the children, was the mother. At this time, two of said minors were over fourteen years of age, and the other four under that age. All of them lived with their mother. They had no legal guardian at

this time, and in August, 1859, the court appointed a guardian *ad litem* for said minors, who duly answered, and a decree by default was entered for the amount due on the mortgage, and a sale was ordered. On January 27, 1860, a special execution issued in due form, and was immediately levied upon the mortgaged estate, which was advertised for sale on March 1, 1860. The sheriff's return, however, showed that he indefinitely postponed the sale, in pursuance of an agreement between the plaintiffs' attorneys and the defendants. On June 19, 1860, the sheriff offered the said property as before, after having given four weeks' notice, etc. The return there recited that the land was purchased by Roberts, who received the sheriff's deed. In 1864 Roberts sold the land to the defendant Maas, for five hundred dollars, the property having been all the time in the possession of the said Maria. In 1865, the plaintiffs, the said Maria, widow, Pundt, her assignee, and the heirs at law of the mortgagor, commenced the present suit in equity to set aside the foreclosure decree and sheriff's sale thereunder. Defendants denied the right of the plaintiffs to the relief sought. The district court entered a decree in favor of the plaintiffs, setting aside the sheriff's sale, and allowing them to redeem the mortgage, plaintiffs having previously tendered the amount. Defendants appealed.

Martin and Kagy, for the plaintiffs.

Templin and Feenan, and *J. D. Templin and Son*, for the defendants.

By Court, DILLON, J. 1. The plaintiff, Maria, the widow of the mortgagor, did not join in the execution of the mortgage, hence she has a right of dower in the land in question, unless this right is barred or extinguished by the foreclosure suit to which she was made a party defendant, and the sheriff's sale thereunder. Defendants claim that the foreclosure decree and sale had the effect to cut off or bar her right of dower. This is denied by the plaintiffs.

In this respect the district court decided correctly. We have examined the foreclosure petition, and find that it contains no allegations with respect to the dower right of the widow, and that it does not in any way seek to bar or foreclose it. It simply prays "that an account be taken of the amount due on the mortgage; that a decree be rendered therefor against the administrator; that the equity of redemption of said heirs at law of said decedent in and to the said mort-

gaged premises be foreclosed; that the same be sold; and for general relief." Her dower had not been assigned to her. Under these circumstances, it is plain that she was not bound to appear and set up her dower right in order to protect it,—to prevent it from being cut off by the foreclosure decree. The decree made no reference to her dower right, and did not undertake to bar it.

Before the foreclosure proceeding was commenced, her dower right had become consummated by the death of her husband. Her right to dower was paramount to the right of the mortgagee; and the facts showing it appeared on the face of the petition.

Her right was not alleged to be inferior or subordinate to that of the plaintiff. She was not bound to redeem from the mortgage to protect her right. If she had joined in the mortgage, or if it had been given for the purchase-money, and she had been made, with proper averments, a party defendant, she would doubtless be barred of her dower by a decree and valid sale thereunder. The decree was rendered by default, and the case falls exactly within that of *Standish v. Dow*, 21 Iowa, 363, a case to which we gave very thoughtful consideration.

The decree did at most only undertake to cut off her right to redeem, and to this extent only can it affect her right. She does not have to redeem in order to save her dower, and hence her right to dower remains unaffected by the decree, giving to it its most extended effect.

To prevent a misapprehension of the point here ruled, we may add that if the wife had joined in the mortgage, or her right to dower had been put in issue, or questioned by allegations in the petition, it would doubtless have been incumbent upon her to have appeared and defended, or else be bound by the decree and sale.

2. The district court held the foreclosure decree void, on the assumed ground, that owing to the defective service or return of service on the minors, the court had no jurisdiction, and hence its decree was a nullity. The district court relied to sustain this view, upon the case of *Allen v. Saylor*, 14 Iowa, 436, which held that unless there was complete service upon the minors, the court had no jurisdiction to appoint a guardian *ad litem*, or to make any order prejudicial to their rights.

But that was a question arising on appeal. In the present case the question arises, not upon appeal, but in another cause.

As the minors and their mother were personally served, although the return would have been pronounced defective on appeal, yet the decree was not void; and hence the heirs at law are not entitled to redeem upon this ground alone.

Upon looking into the evidence, we see no supporting equities which give them the right to be allowed to set aside the foreclosure decree, and to redeem the property from the mortgage, provided the sheriff's sale was valid. It will be observed that the objection to the return of service is purely technical. The minor children had no guardian except the mother, who was their natural guardian; they lived with her, and she had the care and control of them. Both she and they were personally served, and in fact all was done which the statute then in force required: Code 1851, sec. 1721, and c. 133. But the return omits to say that Maria, who was served as well as the children, was the mother; and this omission is the only defect claimed to exist.

The evidence *aliunde* shows that the administrator knew of the suit; counseled with an attorney, and made no defense in court, probably for the reason that no defense existed. In the present proceeding, the validity of the mortgage debt is admitted. So that in point of law we hold that the foreclosure decree was not void, but simply voidable on appeal: *Austin v. Charlestown Female Seminary*, 8 Met. 196 [41 Am. Dec. 497]. And in point of equity, the present bill to redeem, based upon the alleged defective service, is without support in the facts of the transaction.

3. The execution was in due form, and was duly levied. The sale upon a second advertisement was made after the return day of the writ. It is true that the first sale was postponed, and that the sheriff returns that it was indefinitely postponed by the agreement of "the plaintiff's attorneys and the defendant." The evidence *aliunde* shows that the postponement was made at the request of Hunter and of the widow, and for their benefit; that in point of fact there was a definite time understood in which the balance was to be paid, and that the plaintiff in the execution did not order the sheriff to proceed until this time had considerably overrun.

It is not claimed that the sale was made clandestinely or fraudulently. The return shows that the sheriff duly advertised a second time. Although the fact of the sale was known, no attempt was made to question its regularity or validity until the present suit was brought, nearly five years after, and

not until the purchaser at the sheriff's sale had sold the land for value to another. So that there was no equitable reason for setting aside the sale, and it must stand, unless it is void, because made after the adjournment, and after the writ had expired.

The principle decisive of this question has been several times determined by this court. It is, that where there has been, under a valid execution, a levy in its life-time, the officer has the power to sell after the return day. The authorities to this effect are too well settled to be disturbed by a denial of the soundness of the foundation upon which they rest. Many of the cases support sales where the lapse of time was much greater than in the present instance. On this subject, see *Stein v. Chambless*, 18 Iowa, 474 [87 Am. Dec. 411]; *Childs v. McChesney*, 20 Id. 431 [89 Am. Dec. 545]; *Butterfield v. Walsh*, 21 Id. 97 [89 Am. Dec. 557]; *Phillips v. Dana*, 3 Scam. 551; *Wheaton v. Sexton*, 4 Wheat. 508; *La Farge v. Van Wagenen*, 14 How. Pr. 54; *Bicknell v. Byrnes*, 23 Id. 486; *Wood v. Colvin*, 5 Hill, 228. In this last case the sale by the sheriff was made on a writ over two years old, and was sustained. Bronson, J., remarks: "The objection that a new execution should have issued is not well founded. When the execution of a writ of *fi. fa.* has been commenced before the return day has passed, it may be completed by a sale of the property afterward; and the second sale was well made without issuing a new writ. . . . The original levy remained unaffected": *Wood v. Colvin*, 5 Hill, 228-231.

The decree of the district court is reversed, and the bill dismissed, the decree dismissing it to state that it is found and determined herein that the foreclosure decree, and sale thereunder, do not bar the right of the said Maria to dower.

Reversed.

DOWER IS PARAMOUNT to all conveyances, contracts, encumbrances, debts, or liabilities of the husband executed or incurred by him during coverture. See note to *Levis v. Smith*, 61 Am. Dec. 714. As to wife's right of dower in mortgaged premises, see note to *Strong v. Converse*, 85 Id. 734. Wife's inchoate interest in her husband's lands is not lost by mortgage of such lands by him, and foreclosure sale thereunder, where the wife was not a party to the mortgage: *Verry v. Robinson*, 87 Id. 346.

AS TO SECOND POINT IN SYLLABUS, SUPRA, see extended note to *Joyce v. McAvoy*, 89 Am. Dec. 186, on judgments against infants; *Bridgeport Savings Bank v. Eldredge*, 73 Id. 688; note to *Pursley v. Hayes*, ante, p. 350; *Byers v. Fowler*, 54 Id. 271.

DEFECTIVE RETURN OF SERVICE DOES NOT ALWAYS RENDER JUDGMENT VOID: *Byers v. Fowler*, 54 Am. Dec. 271; and a judgment cannot be impeached in a collateral proceeding by showing want of service of process: *Bridgeport Savings Bank v. Eldredge*, 73 Id. 688, note 693; *Durham v. Heaton*, 81 Id. 275.

EXECUTION SALE MAY BE COMPLETED AFTER RETURN DAY, where the execution is levied before its expiration: *Stein v. Chambliss*, 87 Am. Dec. 411, and collected cases in note thereto 413; *Childs v. McChesney*, 89 Id. 545, note 550; *Butterfield v. Walsh*, 89 Id. 557, note 561.

THE PRINCIPAL CASE WAS CITED in each of the following authorities, and to the point stated: Execution issued by courts of record is sufficient authority for a sale after the life of the execution has expired, even without a *venditioni exponas*, provided the levy was made during the life of the execution: *Walton v. Wray*, 54 Iowa, 533; *Wright v. Howell*, 35 Id. 295; and no distinction should be made between an execution issued by a justice of the peace and one issued from a court of record, where there is simply a difference in the manner of renewing the two kinds of executions: *Walton v. Wray*, 54 Id. 533. When there is a service insufficient only in the manner of making it, a question of jurisdiction is raised which the court must decide, and if it does so erroneously, the judgment, though voidable, is binding until reversed and corrected on appeal: *Myers v. Davis*, 47 Id. 330. It is against the spirit and plain intent of the code to allow parties to claim, as fruits of their litigation, that which was not by the fair and obvious import of the pleadings put in issue and litigated between them: *Pfiffner v. Krappfel*, 28 Id. 34; as, in the principal case, where, on the foreclosure of a mortgage not executed by the wife, she being made a party to the foreclosure proceeding, it was held that her dower was not affected, because no claim inconsistent with her dower right was made in the petition: *Oleson v. Bullard*, 40 Id. 14. But where the wife has joined in the mortgage, she will be barred of her dower by foreclosure and sale thereunder, made after the death of her husband. A sale under a foreclosure to which the widow has been made a party, renders the relinquishment of her dower absolute: Id.; *Mead v. Mead*, 39 Id. 31.

McCORMICK AND BROTHER v. HOLBROOK.

[22 Iowa, 487.]

MARRIED WOMAN IS LIABLE ON HER CONTRACT, AS ONE RELATING TO HER SEPARATE PROPERTY, where she, being the owner of a farm and the personal property thereon, purchases upon a written order, not disclosing her coverture, a farming implement for the cultivation of her farm. *Aliter*, if she purchases the implement for a purpose foreign to her separate property.

PETITION, IN ACTION ON CONTRACT AGAINST MARRIED WOMAN, NEED NOT STATE FACTS SHOWING THAT IT RELATES TO HER SEPARATE PROPERTY, where the contract sued on does not disclose the fact that defendant is a married woman. If coverture is pleaded as a defense, plaintiff may meet it by way of replication, and has only to show the facts in evidence constituting the reply, as this pleading is supplied by mere operation of the statute.

EVIDENCE OMITTED BY OVERSIGHT OR MISTAKE MAY BE INTRODUCED WHEN.

— Where plaintiff, in an action on a contract against a married woman which fails to disclose her coverture, inadvertently omits to introduce evidence constituting his reply to the plea of coverture, he may be permitted, in the court's discretion, to introduce it after the argument of one of defendant's counsel has closed.

ON August 7, 1865, defendant executed, in her own name, a written contract or order to the plaintiffs, which she sent them, requesting that they would manufacture and ship to one Lester, at Eddyville, Iowa, for her use, by the 20th of August of the same year, one of their latest improved, light, two-wheeled mowers, to be paid for on August 1, 1866, at the price such a mower would be selling for at that date. The contract contained a warranty, with a privilege that the purchaser might cut two acres of grass for the purpose of testing the machine, but this is immaterial, as there was no evidence whatever of a breach of warranty. Plaintiffs alleged that they had fulfilled the contract on their part; that the mower was worth on August 1, 1866, the sum of \$150, including the cost of shipment; that the same had not been paid; and they asked a recovery for that amount. Defendant pleaded: 1. Breach of warranty; 2. Defendant's disability, from coverture, to make such a contract. One hundred and twenty dollars was found due the plaintiffs. Motion for new trial was overruled. Judgment for plaintiffs, and defendant appealed.

Stuart and Brother, for the appellant.

Perry and Townsend, and Wilkinson, for the appellees.

By Court, LOWE, C. J. Under the assignment of errors, two points are made in argument by counsel for appellant: 1. The invalidity of the contract sued upon, because at the time it was executed by the defendant she was a married woman. The evidence does establish this fact, but it also shows that she was the legal owner of the farm on which she and her husband lived; that she owned the personal property and stock thereon; that two acres of Hungarian grass was cut by the mower on her farm; that her team at one time was seen working the machine; that her husband and one Beck were accustomed to use it in mowing for others. There was no evidence whatever of a breach of warranty, or that the defendant returned or offered to return the mower to the plaintiffs. On the other hand, defendant in her answer claims to have paid thirty dollars on the purchase-money of the machine, and the

evidence tends to show that she has parted with the ownership of the same, and that it now belongs to one George Holbrook. Defendant lives in Iowa, the plaintiffs in Chicago; they furnished the mower upon her written order, which did not disclose her coverture.

Notwithstanding all this, counsel for the defendant insist that the contract cannot stand, under the rule and reasoning laid down in the case of *Jones v. Crosthwaite*, 17 Iowa, 393; and yet the foregoing facts show an important element of difference in the two cases. If she had bought the mower to sell again on a speculation, and not to use in connection with the cultivation of her farm, then the defense set up would fall within the sense and purview of the doctrine laid down in the case referred to, as it respects contracts made by a wife in relation to her separate property. But the evidence in the case strongly tends to show that she bought it with direct reference to her farming operations, as an implement of culture, and in the same sense that she would buy seed-corn or wheat, all of which would come, as we think, within the meaning of the first clause of section 2506 of the Revision, which reads as follows: "Contracts made by a wife in relation to her separate property, or those purporting to bind herself only, do not bind the husband." Not only so, but all the circumstances show that she intended to bind herself only.

This, in the first place, is inferable from the fact that she ordered in her own name, alone, the mower, which *prima facie* bound her. It was intended for the use and reasonable enjoyment of the farm and stock, of which she was the sole legal proprietor; as such was used by her as a farming implement. The fact that her husband and another man also used it in mowing for others does not change the character of the transaction. She bought it, bound herself in a written contract to pay for it, received it, used it on her farm, and afterward paid part of the purchase-money. It would be unreasonable, not to say uncharitable, to suppose that, under these circumstances, she did not intend to bind herself, but rather to practice a fraud upon the vendors, pretending to deal with them as discover, when in fact she intended to take advantage of her marriage relation, after getting possession of the property. But this was not her intention, as the subsequent payment of a portion of the purchase-money, and all the other circumstances, demonstrate. Although unlike the facts in the case of *Rodemeyer v. Rodman*, 5 Iowa, 426, this comes within

the reasoning of that case, and shows that the defendant, in this particular transaction, falls within one of the exceptions to the rule, that a married woman is not liable on her contract at law.

It is claimed, however, in argument, that the plaintiffs, in their petition, should have set out the facts which would have brought the defendant within the exception mentioned, and not having done so, cannot now have the benefit thereof. Since the decision of the last-named case was made, the Revision of 1860 has greatly modified the rules of pleading. The contract upon which this suit is brought does not show the defendant to be a married woman. Under section 2933 of the Revision, in a suit against her, the pleadings need not state facts which would bring her within the exceptions aforesaid. If the marriage relation is pleaded as a defense, which was done in this case, the exceptions to the rule that discharges her from liability are available by way of replication. This pleading is supplied by mere operation of the statute, and the party has only to show the facts in evidence constituting the reply; and this was done, as we have seen.

But the manner in which it was done constitutes the second and only other objection relied upon in argument to reverse this case. This evidence was not offered until after one of the counsel for the defendant had made his argument to the court. Counsel for the plaintiffs then asked permission to prove the facts constituting his reply to the plea of coverture, for the reason that he had inadvertently omitted the same, which was granted against the objections and exceptions of the defendant. This was allowable under section 3070 of the Revision, and we fail to discover any abuse of discretion on the part of the court, and therefore are inclined to affirm the judgment below.

Affirmed.

MARRIED WOMAN, WHEN LIABLE ON HER CONTRACT AS ONE RELATING TO HER SEPARATE PROPERTY: See note to *Johnson v. Cummins*, 84 Am. Dec. 147; note to *Yale v. Dederer*, 72 Id. 513; *Burch v. Breckinridge*, 63 Id. 553; *Litton v. Baldwin*, 47 Id. 605; *Burton v. Marshall*, 45 Id. 171; note to *Dyett v. North America Coal Co.*, 32 Id. 602; note to *Ewing v. Smith*, 5 Id. 589.

INTRODUCTION OF EVIDENCE OUT OF USUAL ORDER IS WITHIN COURT'S DISCRETION: *Commonwealth v. Eastman*, 48 Am. Dec. 596; *Gilbert v. Gilbert*, 58 Id. 268; *Greer v. Caldwell*, 58 Id. 553; *Ashworth v. Kittredge*, 59 Id. 178; *Sanford Mfg. Co. v. Wiggin*, 40 Id. 198.

BROADWELL v. WILCOX.

[22 IOWA, 568.]

WHERE ADJACENT OWNERS HAVE FIELDS INCLOSED IN COMMON, IT IS NO DEFENSE, in an action by one against the other, for willfully and designedly allowing his stock to run in the inclosure and upon plaintiff's crops, that the fence surrounding the inclosure was not a lawful fence.

NO AVERMENT OR PROOF AS TO LAWFUL DIVISION FENCE IS NECESSARY in order that plaintiff may recover of defendant, where they have lands inclosed in common, and the latter has willfully and designedly allowed his stock to run in the inclosure and upon plaintiff's crops.

PLAINTIFF sued before a justice of the peace. His petition contained five counts. The first four counts were answered, and the fifth one was demurred to. The demurrer was overruled, and defendant excepted and stood thereon. The trial resulted in a verdict and judgment for the plaintiff. Defendant prosecuted a writ of error upon the ruling on the demurrer. The district court affirmed the action of the justice in overruling the demurrer, and entered final judgment for the plaintiff. The defendant appealed.

Boardman and Brown, for the appellant.

Henderson and Binford, for the appellee.

By Court, COLE, J. The fifth count in the petition alleged that "plaintiff's farm being inclosed in common with lands rented and had in charge by the defendant, said defendant did willfully allow his sheep to run in said inclosure, to the damage of the plaintiff's crops," etc. The defendant filed and the justice sustained a motion for a more specific statement; and in response thereto the plaintiff added: "The land referred to was not, in the opinion of plaintiff, inclosed by a lawful fence." The defendant demurred to this count because it did not state facts sufficient to constitute a cause of action; for that it "admits the land was not fenced on which the trespass was committed." This demurrer was overruled and excepted to, and is the alleged error complained of. The fair construction of the language of the petition is, that the defendant intentionally put his sheep in the common inclosure. The precise words are, "did willfully allow his sheep to run in said inclosure"; that is, did, by design, with set purpose, allow, etc.: See Webster's Dictionary. Such being the fair construction of the pleading, the nature or quality of the fence surrounding the common inclosure becomes immaterial, and the averment that it was not a "lawful fence" does not negative the cause of action.

As between the parties having the common inclosure, of course no averment or proof as to a lawful division fence is necessary in order to a recovery in such a case as that made by the fifth count. The appellant's counsel insist that the count demurred to is in effect an ordinary claim for trespass by the stock of one upon the inclosure of another; and hence the showing of a want of lawful fence defeats the claim. Whether the same rules as to trespass by animals would apply to the owners of lands in a common inclosure as between one such owner and a third person, we need not and do not determine, for the very plain reason that the pleadings do not present such a question: *Lawson v. Campbell*, 4 G. Greene, 413; *Herold v. Myers*, 20 Iowa, 378. There was no error in rendering final judgment for plaintiff, such matter being within the discretion of the district court in such cases: Revision, secs. 3944, 3945. The case of *Garvin v. Wells*, 8 Iowa, 216, is very different from this. Affirmed.

TENANT OF CLOSE WAS NOT BOUND TO FENCE AGAINST ADJOINING CLOSE AT COMMON LAW; but each was bound at his peril to keep his cattle on his own land: *Holladay v. Marsh*, 20 Am. Dec. 678; *Vicksburgh etc. R. R. Co. v. Patton*, 66 Id. 552; *Myers v. Dodd*, 68 Id. 624; *Lawrence v. Combs*, 72 Id. 332; *Knox v. Tucker*, 77 Id. 233; and in Vermont the owner must restrain his own cattle from trespassing upon his neighbors: *Holden v. Shattuck*, 80 Id. 684. But the common-law rule is not in force in all of the American states. Cattle are permitted by statute in many of the states to go at large: *Vicksburgh etc. R. R. Co. v. Patton*, 66 Id. 552, note 574; note to *Holden v. Shattuck*, 80 Id. 688.

EACH ADJOINING OWNER IS BOUND TO KEEP HIS CATTLE ON HIS OWN LAND IF NO LEGAL DIVISION OR PARTITION FENCE has been established between them: *Knox v. Tucker*, 77 Am. Dec. 233. As to duties of parties to maintain partition fences, and liabilities as to them, see *Lawrence v. Combs*, 72 Id. 332, note 335; *Myers v. Dodd*, 68 Id. 624, and extended note thereto on partition fences 626-638; note to *Pool v. Alger*, 71 Id. 728; note to *Dickson v. Parker*, 34 Id. 80.

FOUNTAIN v. WEST.

[28 IOWA, 9.]

PEREMPTORY CHALLENGE—EXERCISE AFTER WAIVER.—Where when it came plaintiff's turn to exercise his right of peremptory challenge he answers that he has none to make, and the defendant then challenges a juror, and another is called to fill his place, plaintiff may then peremptorily challenge a juror who was on the panel at the time of his waiver; and his neglect to challenge only counts one upon the number of challenges allowed him.

IN ACTION FOR LIBEL, DEFENDANT CANNOT PROVE THAT PLAINTIFF HAS BEEN GUILTY OF SPECIFIC ACTS OF DISHONESTY or particular offenses not connected with the transaction under investigation.

LIBEL. — DEFENDANT, JUSTIFYING IN ACTION FOR LIBEL, WILL NOT BE PERMITTED TO PROVE TRUTH of matters contained in the alleged libel merely aggravatory of the main charge.

WHO HOLDS AFFIRMATIVE. — In action for libel, the plaintiff holds the affirmative, although defendant, in his answer, admits signing the alleged libelous publication, but denies all malice, amount of damage, and intentional publication.

LIBEL. — NO JUSTIFICATION. — A publication which says that, "from circumstantial evidence," defendant "had good reason to believe, and did believe," plaintiff to be guilty of a certain crime, cannot be justified by proving that defendants did so believe, or had good reason to so believe. The plea of justification tendered an issue of fact; and it is incumbent on the defendant to prove that plaintiff was actually guilty of the offense.

LIBEL. — Belief in the truth of a charge claimed to be libelous goes only in mitigation of damages, and is not a justification.

TRUTH OF LIBEL MUST BE ESTABLISHED BEYOND REASONABLE DOUBT.

Where defendant charges plaintiff with a crime, in an action of libel therefor, in order to justify in such action, defendant must produce such evidence of the truth of the charge as would convict the plaintiff if he were on trial therefor.

ACTION for libel in having written and published the following writing: "To J. Y. Fountain: Sir, — We whose names are hereto affixed have good reason to believe, from circumstantial evidence, and from threats that you have made to certain individuals, that you are the man that poisoned George West's cattle; knowing that you are a man who is guilty of all manner of meanness and rascality, and a man that bears the worst character of any man in Harrison County, and the only man we believe would be guilty of the like, therefore, if you are hereafter known to be guilty of any more villainous conduct, or any more stock poisoning, you will be dealt with as justice may demand." The remaining facts appear from the opinion.

Clinton and Sapp, for the appellants.

C. Baldwin, for the appellee.

By Court, DILLON, J. 1. In selecting the trial jury, twelve lawful men being in the box, both parties passed them for cause. Plaintiff, being inquired of by the court, said he had no peremptory challenges to make. Defendants then challenged a juror peremptorily, and another lawful juror was called to fill the panel. Both these passed for cause. But the plaintiff was allowed by the court, against the defendants'

objection, peremptorily to challenge one Tuck, who was on the panel at the time the plaintiff passed his first peremptory challenge. Tuck was directed to retire, and another was called to fill the panel. To this the defendants excepted. In argument, the defendants' counsel cite no section of the statute which was violated by the action of the court. It seems to us that the course pursued was unobjectionable. It certainly is, so far as we know, the usual one. As the jury first stood, the plaintiff was satisfied. Defendants' challenge changed its constitution. We see no good reason for confining the plaintiff to the new juror, or for refusing him the right to make a further peremptory challenge. His first waiver counted one: *Laws 1862, p. 229, sec. 3*; see also *Emerick v. Sloan*, 18 Iowa, 140; *Davenport Gas-light Co. v. Davenport*, 18 Id. 229; *Spencer v. De France*, 3 G. Greene, 216.

2. The court refused to allow the defendants to prove by witnesses that the plaintiff had been guilty of specific offenses and particular acts of dishonesty, such as that in 1859 he had stolen corn; that he had charged one witness with goods which witness paid him for at the time; that he wanted fraudulently "to put land and cattle in the name" of another witness; that he paid a witness five dollars in counterfeit money, etc. We are aware of no rule of law, and appellants have cited no case, which would allow proof to be made of specific offenses and particular acts of dishonesty not connected with the transaction under investigation.

None of these matters were set up in the pleadings. The law presumes every man is prepared at all times to answer as to his general reputation. And hence the court in this case allowed defendants' witnesses to impeach the general character of the plaintiff. But the law does not presume that any man can come prepared to defend himself against specific, collateral acts and charges not in issue in the cause: See *Fisher v. Tice*, 20 Iowa, 479; *Forshee v. Abrams*, 2 Id. 571.

Nor did the court err in refusing to allow another witness on the trial to testify "that the plaintiff was in the habit of committing larcenies; that he had stolen large quantities of timber, corn, posts, etc., and was thereby guilty of all manner of meanness and rascality." The court certifies that it sustained the objection to this evidence on the ground that the substantial charge in the alleged libelous writing was, that plaintiff had poisoned George West's cattle, and the remainder was aggravatory matter to the main charge. The court

accordingly confined the defendants, in proof of their justificatory plea, to facts and circumstances tending to prove that the plaintiff did poison the cattle. In our judgment, the view of the court was manifestly correct: See fourth division of this opinion.

3. The answer denied all allegations in the petition which it did not admit; and among other things, it denied all malice, denied amount of damages, denied intentional publication, etc.

Under these circumstances, the court ruled rightly that the plaintiff held the affirmative of the issue, and had therefore the right to open and close the case. If there should be any doubt upon this point, it would require a very clear case of prejudice resulting from the action of the court to justify reversing for this reason a judgment after trial upon the merits: *Woodward v. Lavery*, 14 Iowa, 381; *Smith v. Cooper*, 9 Id. 376.

4. The plaintiff asked, and the court gave to the jury, the following instructions: 1. "The truth of the libelous matter charged may be given in evidence by defendants under a plea of justification, but such plea tenders an issue of fact, and not a mere matter of belief, and it is incumbent on defendants to prove the truth of the matter charged" under such plea; that is, as applied to this case, if defendants published the alleged writing, it is no justification that they believed plaintiff guilty of poisoning the cattle; but to sustain such plea, defendants must prove that plaintiff did in fact poison the cattle of West. Claiming this to be erroneous, the defendants' counsel argue that the justification need only be as broad as the specific charge, and no broader. This rule is not denied. He then advances another step, and claims that the charge is not that the plaintiff did in fact poison West's cattle, but only that the defendants "from circumstantial evidence had good reason so to believe, and did so believe."

In our judgment, the district court held rightly that the writing in question could not be justified by defendants proving that they believed, and had good reason for believing, the plaintiff guilty of poisoning the cattle.

It would be little less than holding out a bonus for the publication of libelous writings to decide that the party publishing could successfully take covert behind his belief. The law is tender of the reputation of the citizen. It seeks to protect it. It is no light matter to charge another with a crime and publish it to the world. He who does so in a way which the law

holds not privileged assumes the peril of proving it to be true. No other rule would adequately restrain indiscreet, passionate, or malicious persons.

The court charged the jury that if defendants had reason to suspect and believe that the plaintiff had poisoned West's cattle, and published the writing under that belief, this (if plaintiff had not been proved guilty in fact) would only go in mitigation of damages. This ruling was sufficiently favorable to the defendants; and their exception thereto was not well taken.

5. The court charged "the jury that if they had a reasonable doubt of plaintiff's having poisoned George West's cattle, the plea of justification is not made out," and defendants excepted.

Defendants' counsel contend this instruction is erroneous as to the *quantum* of evidence, claiming that a mere preponderance is sufficient, citing 1 Hilliard on Torts, 445, pl. 47, and some other authorities. Under our statute, poisoning the cattle of another is a crime. It is true that some authorities hold that to justify such an offense, the defendant is not bound to produce such evidence as would convict the plaintiff if he were on trial therefor. Other authorities hold just the contrary, and the latter rule has been so held in this state for many years: *Bradley v. Kennedy*, 2 G. Greene, 231; *Forshee v. Abrams*, 2 Iowa, 571; 2 Greenl. Ev., sec. 426. We do not stop to determine how we would decide were the question *res integra*. The rule as adopted in this state has at least an equal weight of authority in its favor. It was adopted many years ago. The legislature has never seen fit to interfere. Under the circumstances, we are not disposed to change it. It certainly has the effect to shield the character of the citizen from incautious assaults, as well as those actually malicious, by compelling full and strict proof of a charge imputing a criminal offense.

The foregoing embraces all the assignments of error of sufficient importance to require distinct notice. We have preferred to meet the questions upon the merits rather than to avail ourselves of the objection made by appellee that the record did not fully present them, because the depositions were not sufficiently identified by the bill of exceptions, and because all the instructions were not embraced therein.

Affirmed.

GENERAL BAD CHARACTER OF PLAINTIFF MAY BE SHOWN in mitigation of damages in an action for libel, but evidence cannot be given of particular acts, and what particular persons may have charged or suspected: *Sheahan*

v. *Collins*, 71 Am. Dec. 271, and note. The principal case is cited to this point in *Masker v. Dunn*, 68 Iowa, 722.

PLEA OF JUSTIFICATION IN SLANDER need not justify the colloquium. It is sufficient to justify the words which constitute the slander as charged in the declaration: *Nott v. Stoddard*, 88 Am. Dec. 633.

DEFENDANT IN SLANDER, pleading the truth of the slanderous words spoken, has the burden of proof upon himself to establish their truth: *Offutt v. Earlywine*, 32 Am. Dec. 40.

BEYOND REASONABLE DOUBT. — To sustain plea of justification in action for slander in charging perjury, the defendant must give as conclusive proof as would be necessary to convict the plaintiff of perjury on an indictment: *Newbit v. Shatuck*, 58 Am. Dec. 706, and note. To the same effect is *Byrket v. Monohon*, 41 Id. 212. The principal case is cited to this point in *Georgia v. Kefford*, 45 Iowa, 52; *Barton v. Thompson*, 46 Id. 32; *Ellis v. Lindley*, 38 Id. 462; *Mott v. Dawson*, 46 Id. 534; *Welch v. Jugraheimer*, 56 Id. 19. These cases and the principal one are overruled upon this point by *Riley v. Norton*, 65 Id. 306.

THE PRINCIPAL CASE IS CITED to the point that an error of the lower court in permitting the wrong side to open and close the case will not justify reversal unless injury be shown, in *Ashworth v. Grubbs*, 47 Iowa, 354, and *Preston v. Walker*, 26 Id. 208.

SIMPSON v. COCHRAN.

[23 IOWA, 81.]

ACTION MAY BE MAINTAINED UPON JUDGMENT IN SAME COURT IN WHICH IT WAS RENDERED while it is in full force and effect, although at the time of bringing his action plaintiff was entitled to an execution on the judgment.

RIGHT TO EXECUTION ON JUDGMENT IS MERELY CUMULATIVE, and does not prevent the judgment creditor from suing upon the judgment.

MERGER. — It seems that a judgment in an action on a note, where the amount of recovery is left blank, does not merge the right of action on the note, although the amount of the judgment was referred to the clerk, who reported a sum which was accepted by the parties.

THE petition in this action contained two counts, the first upon a note, and the second upon a judgment recovered in the same court in a former action upon the note mentioned in the first count. The pleader states that he does not know whether the so-called judgment operated to merge his right of action on the note or not, and that he seeks to recover upon but one of his counts. The note and judgment were introduced at the trial, and it appeared that execution had issued upon the judgment, and that it had been partially satisfied. The judgment was formal, except that the direction that plaintiff recover was blank. It was stated that the amount of damages was referred

to the clerk, who reported an amount which was accepted. The court below gave judgment for defendants, and plaintiff took this appeal.

Phillips, Gatch, and Phillips, and Neal, for the appellant.

Stone, Ayers, and Curtis, for the appellees.

By Court, WRIGHT, J. It is questionable, to say the least, whether the judgment of December 13, 1861, operated to displace or merge plaintiff's right of action on the note. There is certainly no recovery for a specific amount. The order is that plaintiff recover, but the amount thereof is left blank. And under such circumstances it was the right of the plaintiff, under section 2935 of the Revision, to declare as he has, claiming to recover but for one of such causes. Defendants had their election to allow judgment to go against them on either of such causes, or to contest both; and plaintiff, if entitled to recover on either, might do so, or if he had recovered on both, would have been driven to his election; and the recovery on one would be in bar of the other. Some of the members of the court are of the opinion that the first recovery was so wanting in form and substance that plaintiff had a right to sue as he has, and that he should have had judgment; while others, including the writer of this opinion, neither admitting nor denying the correctness of this view, put the reversal upon the single ground, that, assuming the full validity of the first recovery, plaintiff might bring a new suit upon it and recover.

In other words, that a judgment, whether domestic or of another state, gives to the party in whose favor rendered a complete right of action; that it is a contract of the highest character, and he may declare upon it and recover as upon any other contract. The right to execution thereon is merely cumulatory, and the law does not deny the right of action on a judgment, if the holder elects that remedy: *Headley v. Roby*, 6 Ohio, 521, where the point is expressly ruled. So it is in *Greathouse v. Smith*, 3 Scam. 541, which, as is this, was an action upon a judgment recovered in the same court. There it was expressly held that no rule of law is better settled than that an action may be maintained on a judgment; that there was no principle which inhibits the creditor, on a judgment which is in force and unsatisfied, from recovering in an action brought on it, although he may at the time of bringing suit

be entitled to an execution on his judgment; that his right to recover is clear, and the court has no power to prevent him. And see *Denison v. Williams*, 4 Conn. 402; *Jackson v. Shaffer*, 11 Johns. 513; *Millard v. Whittaker*, 5 Hill, 408; *Andrews v. Smith*, 9 Wend. 53; *Haven v. Baldwin*, 5 Iowa, 503; *Thomson v. Lee County*, 22 Id. 206; *Ames v. Hoy*, 12 Cal. 11; *Stuart v. Lander*, 16 Id. 372 [76 Am. Dec. 538]; *White River Bank v. Dower*, 29 Vt. 332; *Kingsland v. Forrest*, 18 Ala. 519 [52 Am. Dec. 232]; *Elliot v. Holbrook*, 33 Id. 659; *Clark v. Goodwin*, 14 Mass. 237; 3 Bla. Com. 160.

Now, it is conceded that an execution might, under our statute, have issued on the first judgment (assuming its validity) at any time before it was barred by the statute of limitations, and that it would not be thus barred for twenty years from the date of its rendition: Revision, secs. 2740, 3246.

The lien continues, however, but for ten years: Revision, sec. 4109. It is also conceded that the creditor might by *scire facias* preserve the lien of the judgment.

But if, instead of doing this, he prefers to take a new judgment, we know of nothing under the statutes of the state to prevent it. Whether he acquires any new rights thereby, or if any, what, or whether he surrenders any, are questions not now before us. What control, if any, the courts have over the question of costs, is also a question not now necessary to consider.

The defendants have a clear escape from what is apparently, and probably in some cases would be, vexatious and oppressive litigation, by discharging the debt, and thus ending the controversy. But so long as the debt is unsatisfied, the creditor may, if he so desires, have a second judgment. The remedy, if any is deemed advisable, is with the legislature.

Reversed.

ACTION OF DEBT WILL LIE UPON JUDGMENT after first execution has been returned unsatisfied, and within the time allowed by the statute for issuing an *alias*; the statutory provision giving the plaintiff the right to coerce the payment of the judgment is merely cumulative, and does not take away the common-law privilege: *Kingsland v. Forrest*, 52 Am. Dec. 232, and note. See also *Field v. Sanderson*, 86 Id. 124.

OSBORN v. CLOUD.

[28 Iowa, 104.]

LEVY AFTER RETURN DAY OF EXECUTION, and after the writ has been actually returned into court after having been levied upon other property, and after the default of defendant who had been served by publication had been entered, is absolutely void, and an order of sale of property so levied upon is also void, and will be set aside on motion.

VOID EXECUTION SALE OF PROPERTY MAY BE SET ASIDE ON MOTION WITHOUT PROOF OF TENDER to the purchaser of the amount of his bid.

PLAINTIFF IS NOT BOUND TO APPEAL FROM VOID ORDER DIRECTING SALE OF PROPERTY LEVIED UPON UNDER EXECUTION, but may obtain relief by motion to set aside the sale.

FACT THAT DEFENDANT MIGHT BY CROSS-PETITION IN ANOTHER SUIT NOW PENDING OBTAIN SAME RELIEF HE NOW seeks in this action by motion, will not abate his proceedings herein.

JUDGMENT IS NOT SUBJECT TO LEVY AND SALE UNDER EXECUTION. The proper practice is to garnish the judgment debtor.

APPEAL by Osborn and Hubbell from an order of the district court setting aside on motion of defendant the levy and sale of a certain judgment in favor of defendant and against one McTighe. The facts of the case are briefly as follows: Osborn commenced a suit by attachment against Cloud, who was a non-resident, and service was made by publication. The writ of attachment against Cloud's property was made returnable on the first day of the January term, 1865. This would fall on January 9th. The writ was before that time properly levied upon certain town lots, and on the 10th of January default of defendant was entered. On the 11th of January the sheriff indorsed upon the attachment that he had levied the same upon a judgment against McTighe in favor of Cloud. January 12th Osborn had his judgment against Cloud entered up and the court ordered the attached property, including the judgment, sold on special execution. Hubbell purchased the judgment. Afterwards Cloud moved to set aside the levy and sale of the judgment, and his motion was sustained; but the supreme court reversed the ruling because Hubbell was not made a party to the proceeding: *Osborn v. Cloud*, 21 Iowa, 238. Upon the matter being remanded Hubbell was made a party, the motion renewed and granted. Osborn and Hubbell now appeal from this ruling.

Polk and Hubbell, for the appellants.

M. D. McHenry, for the appellee.

By Court, DILLON, J. 1. The service being by publication, and the levy on the McTighe judgment having been made after the return day of the writ, and after it had been actually returned into court, and after default had been entered, we concur in opinion with the learned judge below that the court acquired no jurisdiction over the McTighe judgment, and the order subjecting it to sale was void, and the sale under such an order was also a nullity.

2. This answers the objection of the appellants' attorneys, that no sufficient tender to Hubbell of the amount he bid at the sale has been proved, or if proved, it has not been kept good. If the sale was void, it may be set aside without such tender.

3. This also answers the point made by appellant's counsel, that the validity of the levy of the attachment on the McTighe judgment was adjudicated in this cause when the original judgment was rendered and no appeal was taken therefrom.

If, as we hold, the court had no jurisdiction in respect to the McTighe judgment, any adjudication or order it made was without legal force or effect.

4. We find that the point is not well taken, that there is another action pending, in which the defendant asks the same relief that he now seeks. The suit referred to is by one Hampton, and not the defendant.

The present defendant is also made a defendant in Hampton's suit, and so is the present plaintiff. That the present defendant might, by cross-petition in Hampton's suit, obtain the relief he now asks, is no bar to his right to make the present application.

5. It is also argued that Cloud, who makes this motion, has ratified the sheriff's levy and sale, by receiving the proceeds of the latter. This point is not sustained by the evidence.

The proceeds of the sale were received by Osborn, and not by Cloud. Arranging for the lots sold on the second execution would not ratify the sale of the McTighe judgment on the first execution.

6. Again, the court is of opinion that although a judgment is for some purposes called or likened to a chose in action (*Burtis v. Cook*, 16 Iowa, 194; *Ballinger v. Tarbell*, 16 Id. 494), and although the statute provides that "bank bills and other things in action may be levied upon and sold, or appropriated as hereinafter provided (see section 3322), and assignments

thereon by the officer shall have the same effect as if made by the defendant, and may be treated as so made" (Revision, secs. 3272, 3276), still the sale of a judgment in the manner here attempted is unauthorized. Section 3267 speaks of "levying on property and collecting 'things in action,' by suit in the officer's own name." Why speak of collecting by suit if it was meant that "things in action" should include a judgment already rendered? The use in section 3272, above quoted, of the words "assignments thereon," that is, on the instrument, shows that the legislature did not contemplate the levy upon a judgment the same as upon a bank bill, promissory note, and the like.

So section 3322, referred to in section 3272, speaks of "bank bills, drafts, promissory notes, and other papers of a like character," etc. This is language not applicable to judgments.

The sections referred to contemplate property, such as bills, notes, etc., that may be seized and taken into the possession of the officer; property having a visible existence, and of a nature to be present at the sale and delivered to the purchaser.

The statute provides for reaching "debts due the defendant," and the mode thus provided is by garnishment.

The plaintiff should have pursued this course; should have garnished McTighe, who was a resident of the county, instead of levying upon the judgment as he would do upon a horse or other chattel.

The sections referred to above have introduced no such novelty into the law of Iowa as levying upon and selling the judgment of a court.

Affirmed.

LEVY SHOULD BE INDORSED ON EXECUTION IN ITS LIFETIME, and should be distinct and specific: *Davidson v. Waldron*, 83 Am. Dec. 206. It is necessary to validity of levy of execution on real estate that the execution, and the officer's return thereon, should be recorded in the proper office within the life of the execution, and before the return: *Little v. Sleeper*, 86 Id. 697; see *Stein v. Chambliss*, 87 Id. 411; *Butterfield v. Walsh*, 89 Id. 557.

MOTION TO SET ASIDE VOID SALE is the proper practice: *Boles v. Johnston*, 83 Am. Dec. 111; *McLean County Bank v. Flagg*, 83 Id. 224; *Bens v. Hinea*, 89 Id. 590.

THE PRINCIPAL CASE IS CITED *arguendo* in *Ochiltree v. Missouri etc. R'y Co.*, 49 Iowa, 152, where the court say that, under the amended statute, judgments may be levied upon and sold under execution. It is also cited in *Melhop v. Kingman*, 31 Id. 400, to the point that the binding effect of a judgment

depends upon the fact that court had jurisdiction of the subject-matter and of the parties.

SALE OF JUDGMENT UNDER EXECUTION.—By section 3046 of the Iowa code, which was enacted subsequently to the decision of the principal case, it was specifically provided that judgments should be subject to levy and sale under execution. But the construction of this provision has been very strict, and while the court felt compelled to hold that by a direct levy upon the judgment itself, of an execution, it could be sold thereunder, no jurisdiction *in rem* of the judgment could be acquired by the levy of an attachment upon the judgment record; that it could be attached by garnishment only: *Ochiltree v. Missouri etc. Ry Co.*, 49 Iowa, 150.

In Florida, "a judgment is not the subject of levy and sale under execution from a court of law": *Wilson v. Matheson*, 17 Fla. 630-642. No discussion of the question is attempted, the court simply saying: "Choses in action, as bills, bonds, notes, judgments, and the like, are not the subject of levy and sale under execution."

In California, this question has received more attention. In *Adams v. Hackett*, 7 Cal. 187, the court gave sanction to the doctrine that a judgment was subject to levy and sale at execution. The court there say that the statute subjects "debts and credits" to execution, and that a judgment is a debt of record, and the parties to it are called judgment creditor and debtor. The wisdom of such a construction is seriously questioned in *Crandall v. Blen*, 13 Id. 15. In *McBride v. Fallon*, 65 Id. 301, it was distinctly held that a judgment cannot be levied upon and sold under execution, as personal property capable of manual delivery, and that it can only be reached by the statutory remedy similar to garnishment. The court say: "The fact that a debt is evidenced by a judgment does not, in our opinion, make it anything more or less than a debt, or more capable of manual delivery than it would be if not so evidenced. No provision is made for attaching or levying on evidences of debt. It is the debt itself which may be attached." That a judgment is not subject to levy and sale under execution, and that the proper remedy is by garnishment of the judgment debtor, is decided with even more emphasis in *Dore v. Dougherty*, 13 Pac. Rep. 621 (Cal.).

In Louisiana, a judgment is subject to levy and sale under execution. In *Safford v. Maxwell*, 23 La. Ann. 345, the court, after remarking that the remedy by garnishment of the judgment debtor is merely cumulative, continue: "We see no reason to compel a judgment creditor to resort to the delay of the garnishment process in order to ascertain a credit belonging to his debtor, when evidence of that incorporeal right appears on the public records in the form of a judgment or suit." See the previous cases of *Hanna v. Bry*, 5 Id. 651; S. C., 52 Am. Dec. 606; *Rightor v. Suddell*, 9 La. Ann. 602.

STATE v. BENHAM.

[28 IOWA, 154.]

SELF-DEFENSE. — On the trial of an indictment for murder, where it appeared that the defendant was a boy about sixteen years old; that the deceased was a strong, vigorous man, weighing about 170 pounds; that the latter threatened to whip the boy, and advanced upon him for the purpose with an ox-goad in his hand, — it is important that the jury should consider the relative strength of defendant and deceased, the size and character of the ox-goad, and the manner in which deceased threatened to use it, and the manner in which he entered upon the execution of that threat; and the court should call their attention thereto by proper instructions.

SELF-DEFENSE JUSTIFYING HOMICIDE. — If deceased intended to take the life of defendant, or to do him some enormous bodily harm, it would be lawful for him to kill his assailant if he could by no other means prevent the assault. But if deceased intended only a simple non-felonious assault, such as chastising or whipping the defendant, and defendant killed him to prevent such assault, it would be at least manslaughter.

WHERE DEFENDANT SOUGHT DECEASED WITH VIEW TO PROVOKE DIFFICULTY OR BRING ON QUARREL, and afterwards kills deceased, he cannot plead self-defense.

SELF-DEFENSE — GREAT BODILY INJURY. — Defendant is justified in taking his assailant's life to save himself from imminent and enormous bodily injury, felonious in its character; and an instruction, that to justify killing another the defendant must show that it was reasonably necessary to save his own life, is erroneous in failing to so state.

INSTRUCTION WHICH HAS TENDENCY TO MISLEAD JURY SHOULD NOT BE GIVEN.

ACCIDENTAL KILLING, WHEN EXCUSABLE. — If one in doing a lawful act, without any intention of bodily harm, and using proper precautions to prevent danger, unfortunately happens to kill another, the law excuses the killing. Accidental killing wholly to be excused from all guilt must be caused in the doing of some lawful act.

ACCIDENTAL KILLING NOT EXCUSABLE. — If defendant points a loaded gun at deceased under circumstances which would not have justified him in shooting him, and deceased seized the gun and struggled for it to save himself from the threatened injury, and in the struggle it went off without being purposely shot off by the defendant, the latter could not claim that the homicide was excusable: it would be manslaughter.

INDICTMENT for murder, upon the trial of which defendant was found guilty of manslaughter. Defendant was a boy sixteen years old, living with his father. Deceased was a man of average height, weighing about 170 pounds, aged about thirty years, stout and vigorous. The farms of deceased and of defendant's father were on opposite banks of a creek about a rod wide and two or three feet deep. The only evidence against the defendant consisted of two statements made by the deceased between the time he received his injuries and

when he died, which were admitted as dying declarations. They were made at different times, one to his wife, Mrs. Shepard, and the other to Mrs. Hunt, in the hearing of her husband. The substance of Mrs. Shepard's testimony was that Shepard was at the creek with an ox-team loading sand; that Benham came along with a gun on his shoulder, on the opposite side of the creek, looking for some cattle; that they had some dispute about cattle; that the young man accused Shepard of shooting cattle; that Shepard answered that he had shot no cattle, and that if he told him so again he would thrash him. Benham repeated that he had shot cattle, and that he could shoot too. Shepard started across the creek after him, and when about the middle Benham advanced and presented the gun at his breast. Shepard sprung out of the water, took hold of the gun to push it down, and it was discharged into his thigh. Deceased had an ox-goad in his hand. No further statement of the case is needed to understand the opinion. Defendant appeals.

E. W. Eastman, for the appellant.

Henry O'Connor and J. H. Bradley, for the state.

By Court, DILLON, J. It is not denied that the fatal meeting between the deceased and defendant took place at the creek, and on the day named in the indictment. How much the dying declarations establish is the principal question arising upon the evidence.

The deceased at no time charged the defendant with having purposely discharged the gun at him. He complained of his conduct in other respects, such as refusing to assist him; but upon repeated examinations of the evidence, we do not discover that he even stated that the defendant intentionally shot him. Had he so believed, he would most likely have so declared.

There is no reason to question, upon the evidence as it stands, that the meeting at the creek between Shepard and young Benham was accidental. Shepard was there hauling sand, and Benham happened along with his gun, having been sent out to drive away the cattle. Whether the cattle were in view at the time the gun went off does not appear.

On the merits, the defense must rest upon one of two grounds: 1. That the fatal shot was given in necessary self-defense; this assumes that it was intentional, but justified from neces-

sity; 2. That it was purely accidental, and under circumstances to which the law will ascribe no guilt.

Which of the two commenced the altercation or dispute about the cattle is not clear. But it is clear from the testimony of the wife and the Hunts that the deceased made the first threat of an assault; that he either had in his hand, or what is more probable, as he was loading sand, took up, the ox-goad, with which to execute the threat; that he was so angry that he plunged into the stream, threatening to thrash the boy, and that he crossed it for this purpose.

So far there is no dispute. Now, it is to be recollected that the deceased was a large and strong man, weighing about 170 pounds, and the defendant a boy of sixteen years of age. It is probable that physically the deceased was much the superior of the boy.

The physical capacity of the two persons would be an important consideration for the jury in determining the question whether the defendant in what he did was within the law of necessary self-defense. So the size and character of the ox-goad or weapon which the deceased seized or had, the manner in which he threatened to use it, and in which he entered upon the execution of that threat, would also be important considerations for the jury.

Now, none of these circumstances are in any manner alluded to in the charge of the court. The attention of the jury should have been called to these circumstances,—that is to say, to the nature and character of the advance of the deceased upon the defendant.

And the jury should have been directed to ascertain whether all the circumstances in evidence denoted or showed an intention on the part of Shepard to take the life of Benham, or to do him some enormous, some dreadful bodily harm; if they did, then Benham in self-defense might lawfully take the life of his assailant, provided he used all the means in his power otherwise to save his own life or prevent the intended harm; such as retreating, if the assault was not so sudden, fierce, and dangerous as to render retreat unsafe; or if retreat were not practicable, then by disabling his adversary, instead of killing him, if it were within his power simply to disable him.

And to make the above more plain to the jury, it would be well to add, that if the defendant had no reasonable ground to believe that he was in danger of death or great bodily harm, but had reasonable ground to believe that the deceased only

intended a simple or ordinary non-felonious assault,—simply intended to chastise or whip him,—this would not justify the defendant in resorting to the extreme measure of taking the life of his assailant; and if under such circumstances the defendant intentionally fired the gun, he would be guilty of at least manslaughter. Nor would defendant be justified by the laws of the land in shooting at another, if he had no reason to suppose himself in danger of death or enormous bodily harm, merely because it might be regarded as disgraceful or dishonorable not to stand his ground.

Nor can the defendant get the benefit of the plea of self-defense if he sought the deceased with a view to provoke a difficulty or to bring on a quarrel: *State v. Neely*, 20 Iowa, 108.

The law regards human life as the most sacred of all interests committed to its protection, and there can be no successful setting up of self-defense unless the necessity for taking life is actual, present, urgent,—unless, in a word, the taking of his adversary's life is the only reasonable resort of the party to save his own life, or his person from dreadful harm or severe calamity, felonious in its character: *State v. Thompson*, 9 Iowa, 188 [74 Am. Dec. 342]; S. C., 20 Id. 569.

In the main, the charge of the court was very correct, but it was defective in the particular above suggested,—it was not closely enough applicable to the case.

The case was very peculiar, and we may add, in view of the evidence, not a little difficult. There was special necessity for great care in the instructions to the jury. In addition to omitting to allude to the respective sizes and ages of the defendant and deceased, the character of the weapon used by the deceased, and the nature of the advance or assault by the deceased, the charge of the court was, in one or more instances, erroneous or calculated to mislead the jury.

Thus in the eighth instruction the court charged that, in order to make out self-defense, the taking of the life of the deceased must have seemed to the defendant reasonably necessary to save his own life; thus omitting to give the defendant the benefit of the plea of self-defense if he took his assailant's life to save himself from imminent and enormous bodily injury, felonious in its character: See, on this subject, *State v. Kennedy*, 20 Iowa, 569; *State v. Thompson*, 9 Id. 188 [74 Am. Dec. 342]; *State v. Wells*, 1 N. J. L. 424; *State v. Decklots*, 19 Iowa, 447; *State v. Neely*, 20 Id. 108.

Then, again, the twelfth instruction is quite faulty, espe-

cially in its application to the circumstances of the case. It contains this language: "Proof of angry words, actions, or gestures, expressions of contempt without blows, without any assault, would not be sufficient to reduce the crime to manslaughter. But if the assault is made, and death ensues to the party assaulting, and there is no evidence of deliberation, it would be manslaughter; and if the assault was violent, and the instrument or weapon used was a dangerous weapon, as a loaded gun, and such assault was under such circumstances as would lead a man of ordinary prudence to fear for his life, then, if death follows to the assailant, the killing would be justifiable."

This instruction, to have any application, must refer to the assault of the deceased upon the defendant. But the deceased had no loaded gun. It was the defendant who had the gun. By the use of this illustration of a deadly weapon in the hands of an assailant, it would be very easy, if not natural, for the jury to construe this instruction as referring to an assault by the defendant with a loaded gun upon the deceased. Such a state of facts is just the reverse of the case before the jury.

If the jury should believe that the defendant discharged the gun intentionally, the above sufficiently refers to the legal principles upon which the plea of self-defense must rest. But suppose the jury shall believe that the gun was not intentionally discharged by the defendant, what is then the law of the case? It is this: Accidental death, wholly to be excused from all guilt, must be caused in the doing of some lawful act.

The law, in its solicitous regard for human life, requires all reasonable and due caution in the use of dangerous articles or instruments. If one, in doing a lawful act, without any intention of bodily harm, and using proper precaution to prevent danger, unfortunately happens to kill another, the law excuses the killing: *Fost.* 258; 1 *East P. C.*, c. 5, sec. 40, p. 266; *Id.*, c. 5, secs. 8, 36; 1 *Russell on Crimes*, 657, 658; *Whart. Crim. L.*, 2d ed., 382, 385.

If, therefore, the defendant pointed a loaded gun at the deceased, under circumstances which would not have justified him in shooting the deceased, and the deceased seized it and struggled for it to save himself from the menaced injury from it, and in the struggle it went off without being purposely shot off by the defendant, the latter could not claim that the

homicide was excusable. It would be manslaughter; and the circumstances relied on wholly to excuse the defendant would be regarded by the court in affixing the amount of punishment.

The converse of the last proposition would, of course, be true, viz.: that if the defendant pointed a loaded gun at the deceased, and "it went off," under circumstances in which it would have been lawful to have shot it off, the defendant would be regarded by the law as being guilty of no offense.

It is not necessary to notice specially the other errors assigned.

The judgment of the district court is reversed, and the cause remanded for trial *de novo*.

Reversed.

SELF-DEFENSE, WHEN JUSTIFIED HOMICIDE: See the law of self-defense treated at length in *People v. Batchelder*, 85 Am. Dec. 231, and note.

COMPARATIVE STRENGTH OF DEFENDANT AND DECEASED: See *Wies v. State*, 85 Am. Dec. 595, and note.

THE PRINCIPAL CASE IS CITED to the point that the law gives a person the same right to take another's life to protect himself from great bodily harm as it does to protect his life, in *State v. Burke*, 30 Iowa, 331-334; *State v. Middleham*, 62 Id. 150-155; *State v. Mahan*, 68 Id. 306. It is distinguished in *State v. Sullivan*, 51 Id. 144.

CHURCHILL v. MORSE.

[28 Iowa, 229.]

JUDGMENT IS LIEN ONLY ON INTEREST OF JUDGMENT DEBTOR. — If he has no interest, the judgment cannot operate as a lien; as where he has assigned his interest, of which fact the judgment creditor had no notice.

SCHOOL LANDS. — ASSIGNMENT OF CONTRACT TO PURCHASE NEED NOT BE FILED. Contract to sell school land as soon as the purchaser shall pay therefor may be assigned under the code. But the assignment does not have to be recorded in the office of the commissioner, nor would its being filed there operate as notice to third persons. Consequently a judgment against a holder of such a contract, who prior thereto had assigned the same, does not affect the title of the assignee, although the plaintiff had no notice of such assignment.

PURCHASER AT EXECUTION SALE OF MERE EQUITY OF JUDGMENT DEBTOR TAKES SUBJECT TO RIGHTS of persons holding prior equities, as where the equities are equal, the first in time is first in right. The rule relating to legal titles that the purchaser thereof takes, freed from the equities of third persons of which he had no notice, does not apply to such a case.

EQUAL EQUITIES — JUDGMENT WITHOUT NOTICE OF ASSIGNMENT. — Assignee of contract to buy school land holds an equal equity with one who re-

covers a judgment against the assignor, subsequent to the assignment, but without notice of it; and their equities being equal, the assignee, being first in time, will be held first in right.

PURCHASER OF REAL ESTATE AT EXECUTION SALE NEED NOT PLACE ANY EVIDENCE OF HIS SALE ON RECORD until twenty days after the expiration of the full time of redemption, as the publicity of the proceedings is constructive notice of the rights of the purchaser up to that time, but no longer under the statute.

EQUITABLE proceeding to compel the proper officer to issue to plaintiff a certificate of purchase for certain school land, and to quiet his title thereto as against defendants. The facts of the case are briefly as follows: Morse purchased the land in controversy from the school fund commissioner, April 20, 1854; paid one fourth of the purchase-money down, and gave his note for the balance. The official then issued to him a contract to convey the land to him or his assigns upon the payment of the notes. This contract was executed in duplicate, one being retained by the officer, the other given to Morse, April 3, 1855. Morse assigned his contract to Sloan, by writing upon the copy in the school fund commissioner's office. The subsequent assignments were upon the copy given to Morse, and which plaintiff never saw until the commencement of this action. March 13, 1857, Sloan assigned this contract to defendant Fitch. July 20, 1857, the judgment under which plaintiff claims was recovered against Sloan, and this property was sold at execution sale thereunder, July 30, 1859. August 11, 1861, Fitch assigned the contract to defendant Penfield. Plaintiff, having become by assignment the holder of the title founded upon the execution sale, procured a sheriff's deed of the land March 4, 1862, and had it recorded the same day. Both parties, before the commencement of the suit, made the proper tender to the official, and demanded a certificate of purchase, which was refused. Judgment went for defendants below, and plaintiff appeals.

Winslow and Lindley, for the appellant.

Seevers and Williams, for the appellees.

By Court, *COLE, J.* It will be seen by reference to the facts as stated above that Sloan had assigned his interest in the contract before the judgment, under which plaintiff claims, was recovered. At the date of the judgment, then, Sloan had no interest upon which the judgment could operate as a lien. For a judgment is a lien only on the interest of the judgment debtor: *Norton v. Williams*, 9 Iowa, 528; *Bell v. Evans*, 10 Id.

354; *Jones v. Jones*, 13 Id. 276; *Blanney v. Hanks*, 14 Id. 400; *Parker v. Pierce*, 16 Id. 227; *Seever v. Delashmutt*, 11 Id. 174 [77 Am. Dec. 139]; *Welton v. Tizzard*, 15 Id. 495; *Hays v. Thode*, 18 Id. 52.

But the further question arises in the case upon the fact that the assignment of the contract of purchase by Morse to Sloan was made upon the contract filed and recorded in the office of the school fund commissioner, and no assignment by Sloan to any other person was made on that contract.

The statute then in force provided that when the sale of school lands was made upon a partial credit the contract should be reduced to writing, signed by the parties, and filed and recorded in the office of said commissioner. It also provided that it should be lawful for such purchaser or his assignee at any time to pay the amount due on the contract and receive a certificate of purchase: Code of 1851, sec. 1050. The statute recognized the assignability of such contracts, by giving to the assignee the same rights thereunder as were given to the purchaser himself. And it does not provide for or require the assignment to be filed or recorded in the office of the commissioner; nor does it make the recording of the contract there any notice to third persons of the rights of parties therein. But the idea of notice to third parties, from such recording, is very directly negatived by the subsequent sections of the same code of 1851: See sec. 1211 et seq., Revision of 1860; sec. 2220 et seq. We conclude, therefore, that the fact of the assignment to Sloan being upon the contract filed in the office of the commissioner, while there is none from him also filed there, does not change or affect the rights of the parties in this case.

The questions as to the rights of a purchaser of the legal title of a judgment debtor upon execution sale, and whether such purchaser takes the same discharged of equities of third parties thereto, of which he had no notice, are not involved, and do not arise in this case. The plaintiff purchased with a full knowledge that he was acquiring thereby, not the legal title, but only an equity; and of course, such equity as Sloan had in the property, and upon which the judgment was a lien. Having purchased Sloan's rights, he comes into a court of equity to obtain the legal title. And here he seeks the legal title as against a defendant who has also purchased Sloan's rights in good faith and for a valuable consideration paid. So far, then, the parties stand upon equal equity. But the defendant purchased Sloan's rights, and paid therefor before the

defendant did. Such being the case, it is a maxim of equity, that where the equities are in other respects equal, *que prior est tempore, prior est jure*, who is first in time is first in right, or as it is liberally translated, "he has the better title who was first in point of time": 1 Story's Eq. Jur., sec. 64 d; Broom's Legal Maxims, 329.

Where a purchaser acquires the legal title as well as an equal equity, he is then protected and fortified against the equal equity of his adverse claimant: 1 Story's Eq. Jur., secs. 64, 64 c.

The equities of the defendant Penfield in this case are of such a character that they are entitled to protection in a court of equity: See *Parker v. Pierce*, 16 Iowa, 227; *Vannice v. Bergen*, 16 Id. 555; *Wallace v. Bartle*, 21 Id. 346; *Lathrop v. Brown*, 23 Id. 40. The case of *Bank etc. v. Anderson*, 14 Id. 544, cited by appellant's counsel, was different from this, in that the legal title was by the records of the county in the mortgagor, at the date of the mortgage, under a foreclosure of which the defendant claimed.

The doctrine of estoppel, as well as that in relation to diligence, are alike correctly stated by the appellant's counsel; but in our view, the facts do not afford a basis for the application of either doctrine as claimed in this case.

A reference to the statement of facts will show that not only had Sloan assigned the contract before the rendition of the judgment under which plaintiff claims, but it will also be seen that the defendant Penfield purchased the contract more than a year and twenty days after the execution sale, and before the plaintiff procured his sheriff's deed to the property. Our statute provides (Revision, sec. 3355): "The purchaser of real estate at a sale on execution need not place any evidence of his purchase upon record until twenty days after the expiration of the full time of redemption. Up to that time the publicity of the proceedings is constructive notice of the rights of the purchaser, but no longer." At the sale under execution, the sheriff gave to the purchaser a certificate of sale, and the right of redemption existed for one year; so that the proceedings were notice for one year and twenty days from the sale.

The defendant Penfield acquired his rights, by purchase of the contract, two years and twelve days after the execution sale, and seven months and twenty-four days before the sheriff's deed was made to the plaintiff. Upon the basis, then, of constructive notice, even if the assignment in the office of the

school-fund commissioner was such, the defendant Penfield acquired his rights without constructive notice even of the plaintiff's rights, and would be entitled to protection as against plaintiff's title. In either view of the questions made in the case, the judgment of the district court must be affirmed.

LIEN OF JUDGMENT UPON EQUITABLE INTEREST: See *Cook v. Dillon*, 74 Am. Dec. 354, and note. Judgment lien is subject to all equities existing in favor of third persons, as to the debtor's lands, at the time the judgment was rendered: *Buchan v. Sumner*, 47 Id. 305. See *Freeman on Judgments*, sec. 362. The principal case is cited to the point that "it is now the settled law of this state that an attachment or judgment lien does not take precedence over a prior unrecorded deed or mortgage, of which the creditor had no notice," in *First National Bank v. Haylett*, 40 Iowa, 659, and *Hoy v. Allen*, 27 Id. 208.

JUDGMENT LIEN IS CONFINED TO ACTUAL INTEREST OF DEBTOR: *Coombs v. Jordan*, 22 Am. Dec. 236; *Freeman on Executions*, sec. 357.

FARR v. JOHN.

[28 IOWA, 236.]

AUCTION — REQUIRING CERTAIN AMOUNT TO BE BID. — Owner of property being sold at auction may cause the auctioneer to publicly announce that no bids less than five cents will be received; and after such notice a person who bids only one cent in advance of a previous bid, although the previous one was a bid left by an absentee, acquires no title to article upon which he bid.

OWNER OF PROPERTY OFFERED FOR SALE AT AUCTION HAS RIGHT TO PRESCRIBE MANNER, conditions, and terms of sale, and where they are reasonable and made known to the buyer, they are binding upon him.

WHERE OWNER ADVERTISES LOT OF VERY VALUABLE PROPERTY TO BE SOLD AT AUCTION, AND ONLY OFFERS for sale articles of very little value, this fraud has no effect upon any particular sale effected at this auction.

REPLEVIN for a sledge-hammer. Plaintiff advertised by bills or posters a large lot of very valuable property to be sold at auction. At the sale he offered only articles of very trifling value or use. Defendant and his friends were present and were ridiculing the sale, and raising the bids one cent at a time. The auctioneer thereupon, at plaintiff's request, announced that no more bids in sums less than five cents would be received. When the hammer in controversy was handed to the auctioneer, he announced that a bid of two dollars had been left upon it by an absentee, and proceeded to cry it at that figure. Defendant raised the bid one cent, but his offer was disregarded, and no other bids being made, the hammer

was knocked down to the absentee. After the sale was over defendant took possession of the hammer, tendered two dollars and one cent to plaintiff, which was refused, and carried the hammer off with him.

H. and R. Ambler, for the appellant.

L. G. Palmer, for the appellee.

By Court, *COLE, J.* The defendant asked the court to instruct the jury, in substance, that if the plaintiff did advertise largely, as shown by the bill or poster, and at the sale only offered trifling articles, and that defendant bid the highest on the hammer and took possession of it at the close of the sale, as was customary, and tendered the price bid by him for it, then the title to the hammer was vested in the defendant.

The court refused to give the instructions as asked, but instructed the jury that if the plaintiff's auctioneer announced publicly and in the hearing of defendant that no bid less than five cents would be received, and defendant only bid one cent, which was disregarded, and the hammer was not struck off to him, then defendant acquired no title to the hammer, and the plaintiff was entitled to their verdict; and this notwithstanding the plaintiff advertised largely, and stated that the bid of two dollars was by an absentee, and if any one bid more for it to let him have it.

The owner of property offered for sale at auction has the right to prescribe the manner, conditions, and terms of sale; and where these are reasonable and made known to the buyer, they are binding upon him, and he cannot acquire a title in opposition to them and against the consent of the owner. A sale at auction, like any other sale, must have the consent or agreement of both the vendor and vendee. Without this consent, express or implied, no title to property can be acquired. If the owner of the property practices a fraud upon the bidders, he may be liable therefor, but such fact would not have the effect to vest the title to property in a bidder with whom no contract of sale was ever completed. The court did not err in either refusing or giving the instructions to the jury.

Affirmed.

AUCTIONS. — It is competent for seller at public auction to fix minimum price, or reserve the right to bid himself; provided he cause public notice of such fact to be given: *Miller v. Baynard*, 83 Am. Dec. 168.

BEHRENS v. MCKENZIE.

[28 IOWA, 333.]

INJUNCTION — DAMAGES — CARE OF PROPERTY SUBJECT OF INJUNCTION. —

Injunction preventing defendant from digging, or in any way disturbing the surface of the ground, or from manufacturing any dirt already dug into brick, or from removing any brick already manufactured, does not prevent him from protecting from the rain a quantity of bricks molded, dried in the sun, and ready to be burned. It would be no violation of the injunction for him to take steps to protect the bricks, and for any loss which he suffers by reason of his neglect so to do plaintiff will not be liable on his bond.

INJUNCTION — ATTORNEY FEE ALLOWED IN ACTION ON BOND. — Reasonable compensation to an attorney to procure a dissolution of a writ of injunction, or a release of the property from its restraint, may be recovered in an action on the bond, if the injunction was wrongfully issued.**SIGNING BOND WHILE INSANE — NO DEFENSE, WHEN. —** That obligor was insane when he signed an injunction bond is no defense to an action against him thereon, where his insanity was not known to plaintiff at the time he signed the bond, and where it appeared that he was able to transact his own business.**LIABILITY OF INSANE PERSONS. —** Insane persons are generally held civilly liable for trespasses and torts, as the actionable quality of such acts does not depend upon intention. They are not usually held upon executory contracts not for necessities, especially where the insanity was known to the other party. But they are liable upon executed contracts in cases where the transaction is in the ordinary course of business, where the insanity was not known to the other party, and the parties cannot be put *in statu quo*.

ACTION upon an injunction bond. McKenzie obtained an injunction against Behrens, restraining him, among other things, "from digging earth, clay, sand, or gravel upon and from said premises, or disturbing the surface thereof; and from using or manufacturing that already dug or being on said premises into brick; from taking any brick already manufactured, and being thereon." This injunction was afterwards dissolved, as having been improperly issued, and this action was brought to recover damages sustained on account thereof.

Wilson and Doud, for the appellant.

D. E. Lyon, for the appellee.

By Court, DILLON, J. 1. On the trial, plaintiff produced a witness who testified that he (plaintiff) had on the yard about thirty-five thousand brick, molded, sun-drying, and ready to be put into the kiln at the time the injunction was served, and that these brick were all destroyed by a rain that occurred a few

days after the service of the writ. He also testified that if plaintiff had been allowed by the writ, he could have saved a good deal of the damages; "that plaintiff could have saved all the brick that were destroyed if he had had a right to take care of them while the injunction was in force." There was no contradictory testimony on this point.

Defendant asked the court to instruct the jury as follows:—

"2. If the alleged damages resulted from the negligence of the said John Behrens, he cannot recover in this action; and if the jury believe from the evidence that any damage to said brick could have been prevented by plaintiff, by reasonable care, he cannot recover for such damage in this action." Altered by adding: "Provided, however, that the plaintiff is not liable for any want of care on his part, when such property is removed from his custody by the process of the law; and while such property remains in the custody of the law, any act of his intermeddling with it would be a breach of the command of the writ, and be a contempt; the responsibility for proper care thereof resting on the party serving the process of the law until it is returned to the party from whose possession it is taken by the command forbidding him from using or intermeddling with it in any way."

"3. No claim is made as to the burnt brick, and if the sundried or unburnt brick could have been saved from damage by the said John Behrens by reasonable care and diligence, and if the jury so believe from the evidence, he cannot recover in this action for the alleged damages to such brick." Altered thus: "Provided, however, Behrens is in no wise responsible for any want of care of the unburnt brick, after the service of the injunction on him, until the property was returned to him on the order dissolving the injunction."

What the writ restrained plaintiff herein from doing will be seen by reference to the statement of the cause prefixed to this opinion. We hold that the writ of injunction did not prevent the plaintiff from taking steps or using efforts to protect the brick from the rain. Such steps or efforts would not, as supposed by the court below, be any violation of the command of the writ.

The instructions as asked should have been given: *Davis v. Fish*, 1 G. Greene, 406, 409 [48 Am. Dec. 387]; 2 Greenl. Ev., sec. 260, and cases cited.

The alterations made by the court were erroneous.

2. The defendant asked the court to charge: "That the

claim for seventy-five dollars as counsel fees, paid by plaintiff for services in said injunction suit, is not a proper subject of damages in this action, and the same is not to be allowed by the jury." Altered by the court thus: "Provided, however, that a reasonable amount of compensation paid for legal services, in procuring the removal of the writ of injunction, is a proper item of damages."

The court also charged that "reasonable compensation paid for legal services in procuring a release of the injunction," might be recovered in an action on the injunction bond. The defendant excepted, and assigned the court's ruling in this respect as error.

We are aware that the authorities on this subject are conflicting. We have re-examined them to ascertain the reasons advanced to sustain either line of decision. The court instructed that reasonable compensation to an attorney to procure a dissolution of the writ, or a release of the property therefrom, may be recovered in an action on the bond, if the injunction was wrongfully issued.

This does not allow attorney fee for services in defending the entire suit, but for defending against the writ; i. e., for procuring its dissolution or a release of the property from its operation. In our judgment, the better reason is in favor of this rule. This was so stated *arguendo* by Baldwin, J., in *Campbell v. Chamberlain*, 10 Iowa, 337, which was an action on an attachment bond. The tendency of modern adjudication, if not indeed the very decided weight of judicial opinion, is the same way: *Corcoran v. Judson*, 24 N. Y. 107; *Edwards v. Bodine*, 11 Paige, 224; *Thraie v. Quan*, 3 Cal. 216; *Prader v. Grim*, 13 Id. 585; *Garrett v. Logan*, 19 Ala. 344; *Morris v. Price*, 2 Blackf. 457.

The case of *Newell v. Sanford*, 13 Iowa, 463, is distinguishable from the present case, in that the claim for an attorney's fee was not upon a bond.

3. The bill of exceptions states that on the trial the defendant called Dr. Horr, Dr. Sprague, Dr. Finley, and other witnesses, and offered to prove that the said John McKenzie, at the time of signing said injunction bond sued on, was an insane person, and had been insane and *non compos mentis* for a long time previous to the commencement of said injunction suit. This proof the court refused to allow to be made.

Defendant excepted, and now assigns this ruling of the court as error.

The decided cases are far from being uniform on the subject of the liability or extent of liability of persons of unsound mind for acts and contracts done and made while in this condition.

Such persons are generally held liable civilly for trespasses and torts, as the actionable quality of such acts does not depend upon intention: *Morse v. Crawford*, 17 Vt. 499 [44 Am. Dec. 349].

They are not usually held liable on contracts purely executory not for necessities, particularly where the mental unsoundness is known to the other party, or might have been by the exercise of ordinary observation.

But with respect to executed contracts, the tendency of modern decision is to hold them liable in cases where the transaction is in the ordinary course of business, is fair and reasonable, and the mental condition was not known to the other party, and the parties cannot be put *in statu quo*: *Molton v. Cameroux*, 2 Exch. 487; affirmed in error, 4 Id. 17. The special verdict in that case being, in substance, like the answer in the case at bar: *Beavan v. McDownell*, 9 Id. 309; *Pason v. Warren*, 14 Barb. 488, 496; Story's Eq. Pl., sec. 228-238; *Long v. Long*, 9 Md. 348. This case is peculiar. The injunction bond was filed under the statute without consulting the present plaintiff.

The bond was not the result or evidence of a negotiation or contract between the parties. As between an executory and executed contract, the present transaction resembles the latter; McKenzie received and enjoyed the benefit of the writ of injunction, which was the consideration for the bond which he executed.

The answer did not state, nor did the proposed evidence offer to show, that the present plaintiff or the clerk knew of McKenzie's incompetency. His petition for the injunction was filed by respectable attorneys.

It is not to be presumed that they were aware of their client's alleged mental condition. It would seem from these considerations, as well as from other facts of the record, that McKenzie was allowed to and was in the habit of transacting his own business.

The state of the law is such as to allow us to decide this case upon principle, and thus deciding it, we are of opinion that upon the circumstances above indicated no error is shown in the action of the court in rejecting the proposed evidence.

We need not notice the other points made. If the court allowed too wide a range in admitting testimony as to damages, the error in this respect was probably cured by the guarded instructions to the jury.

For the error first noticed, the judgment below is reversed, and the cause remanded.

Reversed.

ATTORNEY FEES. — The law relating to the allowance of attorney fees upon the dissolution of an injunction will be found discussed at length in note to *Tropnall v. McAfee*, 77 Am. Dec. 158. The principal case is there cited.

LUNATIC IS BOUND BY CONTRACTS made before inquisition of lunacy, where no undue advantage has been taken of him, and where evidence of his mental unsoundness was not so manifest as necessarily to give notice of his incompetency to contract: *Sims v. McLure*, 70 Am. Dec. 196. In the note to this case the law is laid down to the same effect as in the principal case. See also *Richardson v. Strong*, 55 Id. 430; *Beals v. See*, 49 Id. 573.

LUNATIC IS LIABLE FOR TORTS: See *Morse v. Crawford*, 44 Am. Dec. 349, and note.

CONTRACTS OF INSANE PERSONS. — Where a contract has been entered into under circumstances which would ordinarily make it binding, by a sane person with an insane person, and such contract has been adopted and is sought to be enforced by the representatives of the latter, it is no defense to the same party to show that the other was *non compos mentis* at the time the contract was made: *Allen v. Berryhill*, 27 Iowa, 534, citing the principal case. It is also cited, and the liability of insane persons discussed, in *Ashcraft v. De Armond*, 44 Id. 234; *Abbott v. Creal*, 56 Id. 177; *Alexander v. Haskins*, 68 Id. 74. It is cited to this point in *Fay v. Burditt*, 81 Ind. 440 (a strong case); *Hicks v. Marshall*, 8 Hun, 332.

ATTORNEY FEES ON DISSOLUTION OF INJUNCTION. — This question is discussed, and the principal case cited and followed, in *Langworthy v. McKelvey*, 25 Iowa, 51; *Plumb v. Woodmansee*, 34 Id. 122; *Wallace v. York*, 45 Id. 83; and *Ford v. Leomis*, 62 Id. 588. It is also cited in *Noble v. Arnold*, 23 Ohio St. 270.

MEYER v. MEYER.

[23 IOWA, 356.]

HOMESTEAD AND DOWER CANNOT BOTH BE CLAIMED IN SAME PREMISES.

Widow who has had set apart to her in fee, as dower, a dwelling-house and part of the forty acres allowed by law as homestead, cannot have the remainder of said forty acres set apart to her as homestead.

HOMESTEAD—TERMINATION OF RIGHT TO OCCUPY. — Under statute giving wife right to occupy premises as homestead until "they are otherwise disposed of according to law," they are so disposed of when they are set apart to the widow in fee as dower upon her own application.

EXEMPTIONS. — Thrashing machine used by a husband for thrashing his own grain, and that of other people for hire, is not exempt from execution

under the statute exempting "the proper tools or implements of a farmer," and it goes to his administrator as assets to be administered.

PROPERTY SET APART TO WIDOW UNDER SECTION 2361 OF REVISION is not hers absolutely, to be disposed of by her for her own use or the support of her family.

JOHN MEYER died leaving a will, in which he left his wife a sum of money in lieu of dower, and he bequeathed to his sons the homestead occupied by himself and wife during life. His wife, the present plaintiff, refused to take under the will, and elected to claim dower under the statute, for which purpose she commenced proceedings, and had set apart to her the dwelling-house and outhouses belonging to deceased, and fifteen and sixty-three hundredths acres of land upon which the same were situated. This land was part of a solid body of more than forty acres owned by deceased when he died. Plaintiff now, in this proceeding, seeks to recover from the sons, claiming under their father's will, a homestead right in a sufficient amount of the remainder of the tract of land to make, with what she already holds, forty acres. The facts about the other points in the case will appear in the opinion.

Grant and Smith, for the appellant.

Davison and True, for the appellees.

By Court, DILLON, J. 1. Of all statutes, none should be plainer, more exact and certain in meaning, than those regulating the distribution and descent of property. It may be quite confidently affirmed that of all existing statutes in this state none are, in many material respects, more obscure and uncertain than those which undertake to define what becomes of and who is entitled to a man's property upon his death. In illustration of this remark, we may refer to the embarrassing questions which have arisen under the act respecting aliens: Revision, c. 100, art. 6; *Purcell v. Sindt*, 21 Iowa, 540; *Stemple v. Herminghouser*, 3 G. Greene, 408; *Krogan v. Kinney*, 15 Iowa, 242; *Rheim v. Robbins*, 20 Id. 45; *Greenheld v. Stanforth*, 21 Id. 595. And also under the act of March 15, 1858, prescribing the descent of property: Revision, c. 100, art. 7; *Norris v. McGaffick*, 21 Iowa, 201.

And now this record presents two similar questions of equal difficulty, and that is left to judicial construction which should be unmistakably defined by legislative words.

Perceiving that unless the statutes in this respect are revised many other questions of great doubt will arise, we limit our

decision strictly to the case in hand, with reference to which the subsequent observations are to be taken.

The plaintiff having had, at her own instance, the only dwelling-house and the fifteen and sixty-three hundredths acres of land set off to her in fee as dower, can she have assigned or set apart to her in addition to this twenty-four and thirty-seven hundredths acres, or enough with her dower to make forty acres, the amount to which the husband would have been entitled as a homestead? We think not.

The homestead right now claimed by the wife is based upon chapter 98 of the Revision. The legal title to all the land was in the testator, John Meyer.

Now, the statute (Revision, sec. 2298) is express that, "subject to the rights of the surviving husband or wife as declared by law, the homestead may be devised, like other real estate of the testator."

The testator did devise it to his sons. This he could do, but this disposition must be subject to the rights of the plaintiff, his surviving wife. What are those rights?

As to homestead, those rights are defined by section 2295 of the Revision, which enacts that, "upon the death of either husband or wife, the survivor may continue to possess and occupy the whole homestead until it is otherwise disposed of according to law." This gives to the survivor the right "to possess and occupy," but does not confer title.

For the argument, it may be admitted that if dower had never been assigned to the plaintiff, or if she refused to have it assigned, she might, as the head of the family, have continued to occupy the house used as a home at the time of her husband's death (Revision, secs. 2278, 2295), and forty acres of land in connection with the house, as long as she should see proper, and against the wishes of the heirs or devisees of the husband.

But while thus "possessing and occupying" in her character as the surviving head of the family, she could not alien or dispose of the land. The land has been disposed of by the will of the husband; and this disposition the statute, as we have before seen, allows him to make: Revision, sec. 2298. Now, it is plain that the statute, in reference to the occupancy and disposition of homesteads, contemplates a house used as a home.

Under other provisions of the statute (Laws 1862, c. 151, p. 573; Revision, sec. 2426 (t seq.)), the widow has proceeded to

have her dower assigned to her, so as to include the dwelling-house, and enough of the land to equal the amount in value to which she was entitled.

This she now owns in fee. She may dispose of it as she pleases. If she continued to occupy it as a home,—as her home,—it would doubtless have impressed upon it the homestead character, and be exempt as such: Revision, secs. 2295–2297; Act April 8, 1862, Laws 1862, sec. 2, p. 147.

The fee-simple title thus acquired by the plaintiff supersedes or takes the place of the possessory right which she would otherwise have had as the surviving wife.

We see no warrant in the law for annexing to this fee-simple title a homestead right in other land.

The title to this twenty-four and thirty-seven hundredths acres under the will is in the sons. If a homestead right were allowed therein to the widow, the title would not be in her. It would still be in the sons, subject to the homestead right. So that we should have this result: the house and the fifteen and sixty-three hundredths acres would belong in fee-simple to the wife; the twenty-four and thirty-seven hundredths acres would belong to the devisees, with a right in the wife to occupy it as a homestead or as part of her homestead. Such a result we do not believe was contemplated by the legislature.

Again, aside from these argumentative considerations against the claim of the plaintiff, the language of section 2 of the act of April 8, 1862, above referred to, and of section 2426 of the Revision, seems also to be against it.

Thus if the property is insusceptible of division, and is ordered to be sold, the widow's interest, though the property sold be a homestead, is limited to one third of the proceeds. And with this money it is enacted that she "may procure a homestead which shall be exempt from liability for all debts, past or prospective, from which the former homestead would have been exempt in her hands."

So by section 2426 of the Revision she may have assigned to her as dower "the ordinary dwelling-house and the land given by law to the husband as a homestead, or so much thereof [not the whole forty acres necessarily, but so much thereof] as will be equal to the share allotted to her by the last section [that is, the one third in value], unless she prefers a different arrangement."

The fair implication, if not the plain language, of these provisions is against the right of a widow to claim part of

what was her husband's homestead, including the house, as her own in fee as dower, and the residue in the capacity of surviving wife of the former owner.

In other words, these provisions of the statute tend very clearly to show that the legislature did not intend that the wife should enjoy at the same time both dower and homestead in the same land. If both had been intended, then it would have been provided that if the land were sold there should be paid to the widow the value of both, i. e., one third of the proceeds as the value of her dower, and also the value of her possessory homestead right. But the statute gives only the value of the dower interest. This was so under the code of 1851 (secs. 1404-1406). It was likewise so under the act of 1853 (Revision, 2478), which limited the widow to one third of the yearly rent, making no allowance for the value of any homestead right in the land sold. And the act of 1862 substantially and almost literally restored sections 1404, 1405, and 1406 of the code of 1851.

Inasmuch as if the whole land in the case at bar had been ordered to be sold, the widow would have received only the one third part, and would have received nothing for her supposed homestead right, this tends very strongly to show that she has no homestead right. For why should she be entitled to more if the land is not sold than if it is?

We have very carefully examined all the legislation on this subject, and feel quite satisfied that the legislature did not intend to give the widow a homestead in land in addition to the dower after the latter has been set off to her.

This view accords with the special provisions of the homestead act before referred to: Secs. 2295-2298. She may "occupy the whole homestead until it is otherwise disposed of according to law." It is otherwise disposed of according to law if it is, upon her application for dower, ordered to be sold because not susceptible of division, and it is thus sold, and one third of the proceeds paid to her, with which she may buy a new home.

If this is so, why is it not also "otherwise disposed of according to law," if it is set apart to her in fee as dower upon her application? After that she occupies her own homestead, not her husband's, so to speak.

This view is also consistent with the language of sections 2296, 2297, and 2298. Whether the twenty-four and thirty-seven hundredths acres will not be held by the sons "exempt

from antecedent debts of their father or their own," we need not decide.

Nor need we decide, if the widow had not applied for dower and had it set off to her, whether she could have been compelled by the sons to elect to take dower, or have it assigned to her, and give up the homestead right contemplated by section 2295 of the Revision. For aught decided herein, it may well be that the widow would have the right as against the creditors, heirs, or devisees of the husband to say, I am satisfied with my homestead right; and hold as a homestead the entire forty acres so long as she continues to occupy it as her home.

But if she proceeds for dower, and has dower set apart to her so as to include the dwelling-house and land adjoining, this deprives her of the homestead right which she previously had in the land by reason of being the survivor, as contemplated by section 2295 of the Revision. In such cases, the dower excludes or supersedes the other. Whether the dower right and the homestead right are cumulative, after dower assigned, provided dower be assigned in the non-homestead portion of the estate, we need not determine positively, though if the foregoing views are correct, they may lead to the conclusion that the legislature did not in any case intend to give the widow the lion's share, by allowing her, in addition to exemptions and her distributive share, to retain the old homestead as such, in addition to dower in fee, after the assignment of the latter. What we decide is, that the plaintiff, having preferred to take her dower as she did, cannot claim the twenty-four and thirty-seven hundredths acres as against the devisees. We are aware of the objections that may be made to this view. But the difficulties surrounding any other view are, it seems to us, much greater.

It may be thought that the case of *Nicholas v. Purczell*, 21 Iowa, 265, is not entirely consistent with the foregoing views. It may be proper to observe respecting that case, that it differs from this, as it involved no question of dower, or as to the effect of an assignment thereof. The relative nature of the dower and homestead rights was not discussed in that case, nor how far the taking of dower would affect the otherwise existing homestead right. The question mainly considered in that case was, whether the widow living in and upon the homestead left by her husband could, at the instance of her

heirs, be compelled to submit to a partition of the homestead; and the court held that she could not.

Without adopting all the reasoning and illustrations of the learned judge below, we think his conclusion is correct, and his judgment upon this branch of the case is affirmed.

2. The thrashing machine was used by the husband to thrash his own grain, and that of other people for hire. Under section 2361, plaintiff claims that this is not assets to be administered, because, as she asserts, it is property which, under sections 3304 and 3305 of the Revision, is exempt from execution. Whether it is thus exempt, is the only question made. It is claimed to be exempted under the language, "the proper tools or implements of a farmer." Taking these last sections together, we are of opinion that they intended to exempt only the ordinary and usual tools of husbandry, and do not extend to a thrashing machine owned by a farmer to thrash his own grain, and that of others for hire.

This opinion rests upon the nature of the machine, and the obvious purpose of the exemption law: Revision, secs. 3304-3309. The machine is complicated and expensive. Judges and legislators must be taken to be conversant with the common facts of every-day life. Such a machine cannot be operated with less than from six to ten horses. It also requires a large force of men. It costs several hundreds of dollars to purchase one. Not one farmer in twenty—perhaps not one in a hundred—owns a machine of this character. The farmer, in general, does not find such a machine a profitable investment. It is cheaper to hire than to own. In consequence of these facts, thrashing machines are operated almost exclusively by persons who buy and own them on purpose to thrash grain for others for hire. In a few instances two or more farmers club together and buy one in common. Very rarely does a farmer buy such a machine for his own use alone. If he owns one, it is generally with a view to "job," or thrash for others. And such would seem to have been the purpose for which the testator owned the machine in question. A few machines do all the thrashing for a township, and thrashing grain may be said to be a business by itself. In view of these facts the exemption law was passed. In view of these facts the law should be construed. The law makes no extravagant exemptions. It is intended for the poor rather than the rich. Its design is to enable the debtor and his family to live, by shielding from the

creditor the ordinary and usual means of acquiring a livelihood.

The exemption is of necessary articles, tools, instruments, etc., and not articles and things merely convenient. Thus it exempts a team of two horses, but a team of two horses cannot operate such a machine. That such a machine is not a necessary implement of husbandry is apparent from the fact that most farmers neither own nor care to own one.

These circumstances distinguish a thrashing machine from a plow, reaper, mower, binder, or fanning-mill, and the latter may well be exempt, and not the former. It might be very convenient for a farmer to own a small portable mill, run by steam, to grind the grain into flour, after it is thrashed, but would it be exempt from execution? Why may it not be if a thrashing machine be held to be exempt? Before concluding, it may be observed, that under a statute similar in its objects and not essentially dissimilar in its language, a thrashing machine has been recently held in New York not to be exempt: *Ford v. Johnson*, 34 Barb. 364.

All the members of the court concur in the above conclusion, but a portion of the court do not wish to be bound if a case should arise in which a thrashing machine was claimed by a farmer who owned and needed it for actual use, and did not keep and own it for the purpose of gain.

3. Plaintiff claims that the property left with her conformably to section 2361 of the Revision is not subject to distribution, but is hers, or at least that she has the right to dispose of it, and use the proceeds for her support and that of the family.

This section has several times been under consideration in this court: *Wilmington v. Sutton*, 6 Iowa, 44; *Schaffner v. Grutzmacher*, 6 Id. 137; *Gaskell v. Case*, 18 Id. 147; *Paup v. Sylvester*, 22 Id. 371. It affords another illustration of the obscurity of the law regulating the disposition of decedents' property. The cases above referred to settle that property left with the widow is not hers in her own right to dispose of as she pleases.

It is to remain with her. She may use and enjoy it. We would not say that she might not dispose of fattened hogs, or otherwise prevent waste.

So far as she claims that the articles set apart to her under section 2361 are absolutely hers, or that she has the absolute

right to sell and receive the proceeds for her own use, we are of opinion that the district court properly decided against her.

How long the property shall remain with the widowed head of the family; whether if she remains and is such head of a family she can insist upon the retention of the property beyond the time when the general personal property of the deceased is distributed under section 2422 of the Revision,—is a question which upon the record does not require a decision: See *Paup v. Sylvester, supra*.

Affirmed.

EXEMPTIONS — TOOLS. — What are included in the words “tools necessary for useful occupation”: See note to *Montague v. Richardson*, 63 Am. Dec. 176; *Garrett v. Patchen*, 70 Id. 414; *Daniels v. Haywood*, 81 Id. 731; *Henry v. Sheldon*, 82 Id. 644, and notes to these cases. The principal case is cited in *Ellsworth v. Ellsworth*, 33 Iowa, 164, where the law relating to property exempt to a widow is discussed. It is cited to the point that the legal title to a homestead descends to the heirs at law of a husband, subject to the widow's homestead and dower rights, in *Size v. Size*, 24 Id. 581. It is again cited and this question further discussed in *Dodds v. Dodds*, 26 Id. 311; *Butterfield v. Wicks*, 44 Id. 313; it is cited to the point that a surviving widow cannot at the same time enjoy a distributive share of her deceased husband's estate in fee, and also a homestead interest in the same property, in *Smith v. Zuckmeyer*, 53 Id. 15; *Smith v. Eaton*, 50 Id. 490; *Whitehead v. Conklin*, 48 Id. 480; *Briggs v. Briggs*, 45 Id. 320; *Butterfield v. Wicks*, 44 Id. 312.

TEUCHER v. HIATT.

[23 Iowa, 527.]

COMPUTING TIME — REDEMPTION OF MORTGAGE. — Time is computed by excluding the first day and including the last day upon which a thing is to be done. So where mortgaged premises have been sold at foreclosure sale on a certain day, the redemptioner has until the last moment of the same day of the succeeding year in which to redeem.

REDEMPTION OF MORTGAGED PREMISES EFFECTED BY SUBAGENT, UNDER COLOR OF AUTHORITY, AND WHOSE ACTS ARE RATIFIED BY THE PRINCIPAL, is good and binding upon the persons who purchased the same at foreclosure sale.

CERTAIN mortgaged premises belonging to Ruth Hiatt were sold at foreclosure sale January 28, 1860, and on January 28, 1861, William Stewart was given a sheriff's deed therefor, which he filed for record at ten o'clock of that day. At four o'clock of the same day Frank Semple appeared at the office of the clerk and redeemed the premises, the clerk accepting the proper amount from him. Semple in making the re-

demption acted under a writing authorizing him so to do, which writing was executed by Ruth Hiatt, by Ratliff, her agent. The lower court held that Semple's authority was ample, and the redemption in time.

Casey and Hollman, for the appellant.

D. F. Miller, and Cook and Drury, for the appellees.

By Court, COLE, J. 1. At the common law, the rule as to computation of time was not uniform. In certain cases, the day of the act done, or happening of the event, was included; as, where a sheriff was not to be called upon to return process after six months from the expiration of his office: *King v. Adderly*, Doug. 463, 2d ed.; in computing time from an act of bankruptcy; in the limitation of actions against the hundred upon the statute of hue and cry; to prevent a descent from barring an entry (Co. Lit. 255 a), etc. But the more general rule was to exclude the day, although each case was made to depend upon the reason of the thing, according to its circumstances: *Lester v. Garland*, 15 Ves. 248. The American cases almost uniformly exclude the first day: *Bigelow v. Willson*, 1 Pick. 485; *Sims v. Hampton*, 1 Serg. & R. 411; *Rand v. Rand*, 4 N. H. 267; *Priest v. Tarlton*, 3 Id. 93; *Windsor v. China*, 4 Greenl. 304; *Pease v. Norton*, 6 Id. 233; *Wheeler v. Bent*, 4 Pick. 167; *Snyder v. Warren*, 2 Cow. 518 [14 Am. Dec. 519]; *Ex parte Dean*, 2 Id. 605 [14 Am. Dec. 521]; *Henry v. Jones*, 8 Mass. 453; *Portland Bank v. Maine Bank*, 11 Id. 205; *Hoffman v. Duel*, 5 Johns. 232; *Gillespie v. White*, 16 Id. 117.

But in our state, the manner of computing time has been regulated by statute (Code of 1851): "Sec. 2513. The mode of computing time is by excluding the first day and including the last, unless otherwise expressed." Revision, 1860: "Sec. 4121. Unless the terms 'clear days' are used, the mode of computing time is by excluding the first day and including the last."

This last provision took effect September 1, 1860. The provision as to redemption is as follows: "Sec. 3331 (1925). At the time of the sale, the sheriff shall give to the purchaser a certificate, . . . stating that unless redemption is made within one year thereafter, . . . he will be entitled to a d.e.d. Sec. 3332 (1926). The defendant may redeem such property at any time within one year from the day of sale."

Under the Code of 1851, or the Revision of 1860, we are clear in the opinion that the first, or day of sale, is to be ex-

cluded, and that the right of redemption, therefore, existed during the whole of the same day of the succeeding year. The sale being made on the twenty-eighth day of January, 1860, the right to redeem continued until the last moment of the twenty-eighth day of January, 1861. The redemption in this case was, therefore, in due time.

2. As to the right of F. Semple to make the redemption. While it is true, as stated by counsel for appellant, that "agency is generally a personal trust and confidence which cannot be delegated," yet there is nothing in this case to show but that the agent Ratliff was authorized to effect the redemption through a subagent. The ratification of the act of the subagent would tend to show that this was so. However this may be, the redemption effected by such subagent, under color of authority, and whose act was ratified by the principal, is good and sufficient as against the defendant Stewart: *Blackwell on Tax Titles*, 501, 504, 505, and authorities cited. Affirmed.

IN COMPUTING TIME, the practice of the American courts is to exclude the first day and include the last: *Owen v. Slatter*, 62 Am. Dec. 745, and note; *Smith v. Cassity*, 48 Id. 420; *Jones v. Planters' Bank*, 42 Id. 471; *Barber v. Chandler*, 55 Id. 533, and note.

AGENT'S POWER TO DELEGATE AUTHORITY. — A discretionary power given to an agent cannot be delegated by him: Note to *Newton v. Bronson*, 67 Am. Dec. 105; *Sayre v. Nichols*, 68 Id. 280. Agent having bare authority cannot delegate it: *White v. Davidson*, 63 Id. 699; *Wright v. Boynton*, 72 Id. 319. Agent may delegate powers or duties merely mechanical: *Sayre v. Nichols*, 68 Id. 280. Authority of agent to employ subagent may be implied from circumstances or from the usages of trade: *Appleton Bank v. McGilroy*, 64 Id. 92.

NOBLE v. BULLIS.

[23 IOWA, 559.]

MISTAKE OF FACT IN REDEEMING FROM TAX SALE will be relieved against in equity the same as are other cases of mistake of fact.

RELIEF FROM MISTAKE OF FACT. — Plaintiff's land had been sold for the taxes of a certain year. By mistake it was afterwards sold for the taxes of the same year. Upon discovering the fact of the first sale, and without knowledge of the second, plaintiff went to the clerk to redeem, and the clerk by mistake consulted the record of the second sale, and upon the plaintiff's paying him the amount due thereon, issued to him a certificate of redemption: *Held*, that these facts entitle plaintiff to redeem from the first sale after the period prescribed by law had expired, upon paying the holder of the tax deed the amount due him, with penalty and interest.

PLAINTIFFS' property was sold for taxes of 1861, on the 17th of December, 1862, to one Anderson, who afterwards

assigned the certificate of purchase which he received to defendant, and on March 14, 1866, the treasurer executed to the latter a tax deed therefor. The same land was again, by mistake, sold for the same taxes, May 4, 1863, to one Delcow. December 7, 1864, plaintiffs heard of the sale of their property for taxes, and went to the clerk to redeem. The clerk by mistake went to the record of the second sale, and upon plaintiffs' paying the amount which it called for, issued to them a certificate of redemption from that sale, which plaintiffs accepted as evidence of a complete redemption of their property. They had never heard of the first sale until after the tax deed issued to defendant. The lower court granted plaintiffs the desired relief, and defendant appeals.

Reuben Noble, for the appellant.

E. E. Cooley, for the appellees.

By Court, COLE, J. There is no sufficient reason why a mistake of fact may not be a ground for equitable relief in a case of tax sale and redemption as well as in any other case. If the plaintiffs, as is conceded by the record in this case, had no information of any sale of their property for taxes, except of one, a valid and proper sale, and applied to the proper officer in good faith to redeem the same, and such officer received their redemption money, and gave them a certificate thereof, which was given and received as a redemption from the tax sale for the taxes of 1861, then they ought not to be deprived of the benefit of such redemption by a mere mistake of fact on the part of the officer through whom such redemption must be effected. The good faith, intention and effort to redeem, and the mistake of fact in connection therewith, are conceded in this case. Such mistake of fact, too, lies at the door of the officers of the law; and while superior or extraordinary diligence on the part of plaintiffs might have discovered the mistake before the execution of the tax deed to defendant, yet it was not within the range of ordinary diligence in such matters.

The district court did not err, therefore, in holding that the redemption by the plaintiffs operated in equity to defeat the defendant's legal title, which would otherwise have vested in him by his tax deed. But the defendant is entitled to the redemption money, since his purchase was a valid one, and carried with it the right to the penalty and interest. The second sale was not valid, nor was the purchaser thereunder, as against plaintiffs, entitled to the statute penalty and interest. And since the plaintiffs did not make the second purchaser,

who has received the redemption money, a party defendant to this suit, so that the defendant, Bullis, might have the money due him as upon redemption paid to him as an equivalent for the title or right of which he is deprived by the judgment, it was error to cancel the defendant's title without at the same time requiring the plaintiffs to pay to him the proper redemption money as a condition precedent to any relief under the decree. For this error, the cause is reversed and remanded for further proceedings not inconsistent with this opinion.

Reversed.

MISTAKE, EQUITABLE RELIEF IN CASE OF: See *Kenyon v. Welty*, 81 Am. Dec. 137; *Jordan v. Stevens*, 81 Id. 556; *Freeman v. Curtis*, 81 Id. 564; *Sawyer v. Hoovey*, 81 Id. 659; *Banta v. Vreeland*, 82 Id. 269, and note.

REDEMPTION FROM TAX SALE. — Where the treasurer on the same day made different sales of the same lands for the taxes of the different years, and the owner, being aware of but one sale, redeemed therefrom in good faith, he will be permitted to redeem from the others after the expiration of three years by paying the amount for which the land was sold, with legal interest and penalty: *Shoemaker v. Lacey*, 38 Iowa, 277, citing the principal case. It is cited to much the same effect in *Fenton v. Way*, 40 Id. 196; *Corning Co. v. Davis*, 44 Id. 625. The principal case is distinguished in *Shoemaker v. Lacey*, 45 Id. 424; *Moore v. Hamlin*, 38 Id. 483.

MORRISON v. MARQUARDT.

[24 IOWA, 25.]

LAND MAY BE DEDICATED TO PUBLIC USE WITHOUT DEED OR OTHER WRITING, but the intent to dedicate should be clear, and the acts or circumstances relied on to establish such intention should be unequivocal and convincing.

IMPLIED EASEMENT OF LIGHT AND AIR. — English doctrine, that if one sells a house with windows and doors looking upon his own vacant ground, neither he nor his grantee can afterward build upon such vacant ground in such a manner as to seriously obstruct the flow of light and air to such house, is inapplicable to our situation and circumstances, and is not in force in Iowa.

DOCTRINE OF IMPLIED EASEMENTS RESTS UPON SUPPOSED INTENTION OF PARTIES, as deduced from the situation and condition of the two estates, servient and dominant, to which the easement relates.

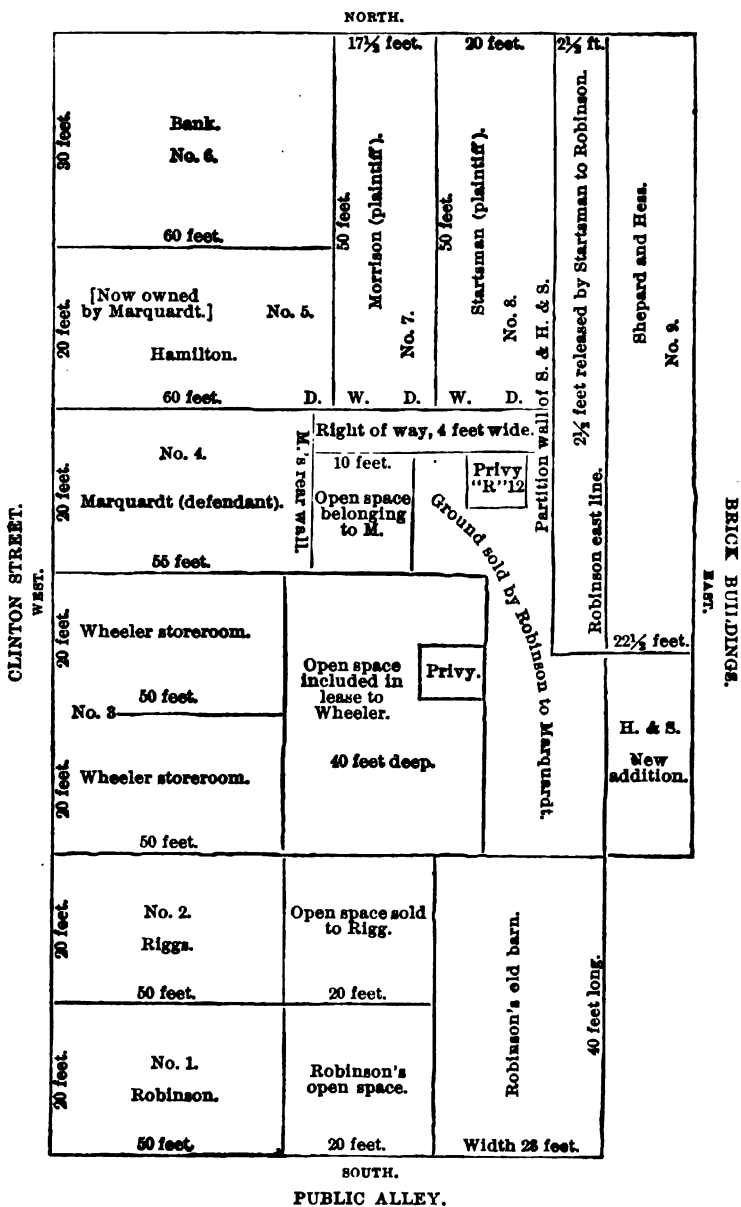
EASEMENT PREVENTING OWNER OF LAND FROM IMPROVING IT as he pleases should not be implied where it is not clearly given.

PARTY MAY ABATE NUISANCE WITH HIS OWN HAND, but such abatement does not consist in the destruction of the property, unless such destruction be absolutely necessary.

PARTY MAY ENFORCE RESTORATION OF BUILDING IN WHICH HE HAS EASEMENT, and which was illegally destroyed under the pretense that it was a nuisance. He is not remitted in such case to his action for damages.

SUIT in equity. Reference to the following diagram will assist in understanding the facts:—

WASHINGTON STREET, 100 FEET WIDE.



The city lot, as bounded in the diagram, was originally owned in fee by one Robinson, and the numbers from 1 to 8 indicate the buildings erected thereon. Nos. 1, 2, 4, 5, and 8 were erected by Robinson; and one Wheeler, under a lease hereafter mentioned, built two stores on No. 3. Cook, Sargent, and Downey built No. 6; and Startzman, one of the plaintiffs, and owner of No. 8, built a store thereon the size of the lot. Morrison and his children, also plaintiffs, own No. 7, and the stores of the plaintiffs run south to the right of way four feet wide. Store No. 7 was built by Robinson, and sold by him to the wife, since deceased, of the plaintiff Morrison. He also built No. 5, and sold it to Hamilton, and the latter sold it to the defendant Marquardt. In the building No. 5 was a door D, opening into the four feet right of way. Marquardt also purchased No. 4 of Robinson, also eleven feet on the rear thereof, being twenty feet by sixty-six feet, the purchase being made August 11, 1863. Robinson sold No. 6 to Cook, Sargent, and Downey in 1858, and that firm erected thereon a bank building. In the same year he leased No. 3 to Wheeler for ninety-nine years, prior to which he had built stores 1, 2, and 4. In this lease Wheeler "agreed to erect upon said ground leased to him a three-story building to correspond to a plan made by said Wheeler, of which plan the building known as the jewelry store of G. W. Marquardt (No. 4) forms a part." Wheeler erected thereon two brick stores, the east end being of wood, the more easily to admit of being enlarged eastward; and Robinson built No. 1 in a similar manner, and owns it and the barn in the rear. June 1, 1863, Robinson sold No. 5 to Hamilton, granting also right of way four feet wide, extending from the southeast corner of said premises east across ground of the said Robinson; also the right to the use of the privy standing on ground of the said Robinson. June 3, 1863, Robinson sold No. 8 to the plaintiff Startzman, granting also the right of way four feet wide along the south end, and two feet six inches in width along the east side of said premises; also a right to the use of the privy in the rear of said premises; and also the right to extend the second story of any building the grantee might erect on said premises over the two feet six inches alley or right of way on the east. Startzman afterward erected a store, but did not extend the second story over the two feet six inches right of way, and subsequently (in 1865) conveyed to Robinson all his right to this strip, and Robinson, the same day, conveyed the strip by war-

ranty to Shepard and Hess, who owned No. 9 on the diagram. Shepard and Hess, by the consent of Startzman, so built as to close up this right of way, the latter receiving compensation for half of his wall used by the former. August 11, 1863, Robinson sold and conveyed to the defendant Marquardt store No. 4, and also the unoccupied eleven feet east thereof, "with the privilege of right of way four feet in width running from the northeast corner of the building on said premises east to an alley ten feet wide, running south to city alley: granting also the right to use a privy due east of said premises, also the right of stairway secured to Robinson by the Wheeler lease." At the time of this sale, Robinson still owned No. 7, soon afterward sold to Morrison, and the eleven feet east of No. 4, and included in the deed to Marquardt, was vacant, and extended east to a point beyond the window in the rear of store No. 7. September 15, 1863, Robinson sold to Morrison store No. 7, the deed granting also the right of way four feet wide along the south end of said premises, and also the right to use a privy in the rear of said premises. February 20, 1866, Robinson sold No. 2, and twenty feet in the rear thereof, to Riggs; and June 12, 1866, he conveyed to the defendant Marquardt the ground east of No. 4, and the ten feet east of the property leased to Wheeler, the deed containing the following clause: "Saving and excepting the right of way to a strip four feet wide off the north side of said premises heretofore granted to the owners of land immediately north of the above-named premises, and the privileges granted said parties by the said Robinson." After his last purchase, Marquardt removed the privy thereon, claiming that it was a nuisance; he also made preparations to extend No. 4 eastward across the open ground, and over the privy site, up to the walls of the store of Shepard and Hess. Morrison and Startzman, as owners of Nos. 7 and 8, then brought this suit, claiming: 1. That Robinson dedicated the ground east of the stores fronting on Clinton Street, and south of the plaintiffs' stores, as an area, to be permanently kept open for the use and convenience of said stores; 2. That on the purchase of said property from Robinson, they became entitled to an easement of light and air, which would be destroyed by the proposed addition to his building by the defendant Marquardt; 3. That they had an easement in the privy which Marquardt had removed without right. The petition made Robinson and Marquardt defendants, and prayed "that a temporary

injunction be granted enjoining defendants from building on the open area aforesaid, or any part thereof; that the same on final hearing be made perpetual; that plaintiffs be entitled to have erected and maintained at the expense and costs of said Robinson said privy so removed as aforesaid, and for their costs and general relief." The answer denied a dedication of the open area, and admitted the removal of the privy, claiming that it was a nuisance. It also admitted the proposed extension of his store by Marquardt, but not so as to interfere with the right of way south of plaintiffs' premises; and denied that the proposed erection would substantially interfere with the reasonable enjoyment of the plaintiffs' stores as regards light and air. The cause was referred, and both parties appealed from the decree entered on the referee's report; the plaintiffs claiming that Marquardt should have been restrained from erecting any building in the rear of their stores, and Marquardt claiming that the injunction should have been dissolved, and that he should have been allowed to build without any restriction as to light.

Fairall and Boal, and Edmonds and Ransom, for the plaintiffs.

William Penn Clark and William C. Gaston, for the defendants.

By Court, DILLON, C. J. 1. The principles involved in this cause have never been judicially settled in this state. They are principles of no ordinary importance. The adjudications elsewhere upon the same or similar questions are not uniform. This court is charged with the duty of deciding which is the better, or what is the true, rule in cases of this character.

Before proceeding further, it should be observed that the testimony is voluminous, and upon some points conflicting. So far as the case involves questions of fact merely, it is not proposed to enter into an extended review of the evidence.

So far as it involves questions of law and principles applicable to the future cases, a more extended examination is not only proper, but is required, both by the importance of the cause itself and the conspicuous ability with which it has been argued by the respective counsel.

It should be further remarked that the defendant admits the existence of the four-foot right of way immediately south of the plaintiffs' premises, and claims no right to build thereon.

There is evidence tending to show a dedication or contemplated dedication by Robinson of an alley ten (10) feet in width, on the east side of the premises, extending from the four-foot right of way south to the public alley. But the existence or otherwise of the ten-foot alley is not put in issue by the pleadings, nor is relief prayed in respect thereof. Under these circumstances, we leave open all questions in relation thereto.

Plaintiff insists that the property on which the defendant now proposes to build was dedicated by Robinson as an open area for access to the various stores, for the convenience of such stores as a place whereon to deposit barrels, boxes, etc., and to supply the rear of the stores with light and air. It is claimed, also, that the defendant knew of this dedication prior to his purchase, made June 12, 1866, and referred to in the statement of facts. No map or plat showing, and no writing expressing, such dedication was ever made. But plaintiffs contend that there may be a dedication by parol, and that the present is a case of that character.

That there may be a dedication to public use without a deed or other written evidence is undoubtedly true. But in such cases the intent to dedicate should be clear, and the acts or circumstances relied on to establish such intention unequivocal and convincing. The present case does not meet this requirement. The plaintiffs testify that as an inducement to the purchase of their respective parcels, Robinson stated to them that the area should remain open to the use of all the stores around it, the same as before. But this is positively denied both by Robinson and Judge Miller, his son-in-law and agent.

It is argued that plaintiffs are corroborated by the almost uniform depth of the various stores, and the fact that the ground had been left open and remained open without objection, until about the time this suit was brought. But this is more than overcome by the circumstances that Robinson always claimed to own the open ground in question, paid taxes thereon, exercised control thereover; and by the silence of the conveyances to the plaintiffs respecting any such right as that now claimed.

It appears that the conveyances were made with deliberation, and examined with care before being received and accepted. They are minute as to other rights and privileges,---rights of way, use of privy, etc.,---but silent as to any rights

in, to, or over the vacant ground, the alleged dedication of which is now claimed to have been a controlling inducement to the purchase.

If it was understood that plaintiffs were to have such valuable rights in the vacant ground, or if it was understood that it was dedicated to their use or that of the public, it is scarcely credible that they would have been satisfied with deeds making specific mention of "mint and anise and cummin," yet wholly "omitting the weightier matters" of the contract.

Again, Robinson had not the power to leave it all open, as it is claimed he represented he would. For Wheeler had his lease for ninety-nine years, for ninety feet in depth, and up to within twenty feet of plaintiffs' stores. Wheeler might build on or inclose this at his pleasure. He was not restricted as to the depth of the building to be erected by him. When Morrison purchased, Marquardt owned the land south of the window in the cellar and lower story of the Morrison building; and this was known to Morrison; and it is not likely that he would buy, relying upon Robinson's promise that all the land should be kept open.

The maxim, *Expressio unius*, etc., or at least the reason upon which it rests, would seem justly to apply here. For why mention a right of way four feet wide, if all was to remain open for a rear drive, access, place of deposit, etc.?

Again, the weight of testimony decidedly is, that the plaintiffs, or at least one of them, wished to purchase of Robinson, to build thereon, the ground which they now claim was dedicated by him as an open area.

Upon the whole, the court is well satisfied that the plaintiffs' claim of dedication is not established. The case is essentially unlike *Maxwell v. East River Bank*, 3 Bosw. 125; *Tallmadge v. East River Bank*, 26 N. Y. 105, and other cases cited on this head by the plaintiffs' counsel.

2. The next point made by the plaintiffs is, that it is an established principle of law, that if one man builds a house with windows or doors looking over or opening upon his adjoining vacant land, and sells the house, neither he nor his grantee can afterward build upon the vacant ground so as seriously to obstruct the flow of light and air to the windows and doors of that house. Plaintiffs do not contend for the English doctrine of a prescriptive right to light and air.

But the exact position they take, as expressed in the written argument, is: "That Robinson, the former owner of the

parcels sold to Morrison and Startzman (the plaintiffs), and at the same time of the open ground (subsequently sold defendant, and upon which he proposes to build), having sold to plaintiffs their respective parcels with buildings having windows, cannot afterward build upon that portion retained by him in such a way as to obstruct the light and air necessary to the comfortable enjoyment of the plaintiffs' said buildings; and what Robinson himself could not do, Marquardt, his grantee, cannot." Defendant's counsel deny that the above is an established principle of law.

That this principle is recognized by the English courts, admits of no doubt. Mr. Washburn states it thus: "If one who has a house with windows looking upon his own vacant ground sell the same, he may not erect upon his own vacant land a structure which shall essentially deprive such house of the light through its windows": Easements, 492, pl. 5.

Speaking of this subject, Chief Justice Tindal (in *Swansborough v. Coventry*, 9 Bing. 305, Com. B., 1833) says: "It is well established by the decided cases that where the same person possesses a house having the actual use and enjoyment of certain lights, and also possesses the adjoining land, and sells the house to another person, although the lights be new, he cannot, nor can any one who claims under him, build upon the adjoining land so as to obstruct or interrupt the enjoyment of those lights. The principle is laid down by Twissden and Wyndham, JJ., in the case of *Palmer v. Fletcher*, 1 Lev. 122, 'that no man shall derogate from his own grant.' The same law was adhered to in the case of *Cox v. Mathews*, 1 Vent. 237; by Holt, C. J., in *Roswell v. Pryor*, 6 Mod. 116; S. C., 12 Id. 215, and 635; and lastly, in the case of *Crompton v. Richards*, 1 Price, 27" (A. D. 1814).

The doctrine in question rests upon *Palmer v. Fletcher*, *Cox v. Mathews*, and *Roswell v. Pryor*, above cited. The other cases in England follow these as establishing the principle laid down by Chief Justice Tindal, in the extract just given.

The decisions in this country on the exact point as to whether the right to light and air will pass by implied grant are neither very numerous nor uniform. As sustaining the doctrine that a vendor of a house cannot afterward, on his adjoining vacant land, make an erection which shall deprive such house of light, see *Story v. Odin*, 12 Mass. 157 [7 Am. Dec. 46]; *United States v. Appleton*, 1 Sum. 492 (*arguendo per Story, J.*); *Lampman v. Milks*, 21 N. Y. 505 (*arguendo per*

Selden, J.); *Gerber v. Grubel*, 16 Ill. 217 (*arguendo*). Opposed to this doctrine, see *Myers v. Gemmel*, 10 Barb. 537; *Palmer v. Wetmore*, 2 Sand. 316; *Parker v. Foote*, 19 Wend. 309 (*arguendo per* Bronson, J.); *Haverstick v. Sipe*, 33 Pa. St. 368 (*arguendo per* Lowrie, C. J.).

The grant of easements by implication has been much discussed in the courts of England of late years, as will be seen by the following cases: *Pyer v. Carter*, 1 Hurl. & N. 916, 1857 (as to drain); explained, *Polden v. Bastard*, 4 Best & S. 116, Eng. Com. L. 257 (use of pump); *Glare v. Harding*, 3 Hurl. & N. 937; *White v. Bass*, 7 Id. 722, 1862 (as to light); *Curriers' Company v. Corbett*, 2 Drew. & S. 355; *Suffield v. Brown*, 10 Jur., N. S., 111; *Crossley v. Lightower*, L. R. 2 Ch. App. 478, 1866; *Clarke v. Clark*, L. R. 1 Ch. App. 16; *Robson v. Whittingham*, Id. 442; *Martin v. Headon*, L. R. 2 Eq. 425; *Dent v. Auction M. Co.*, Id. 238; *Dodd v. Burchell*, 1 Hurl. & C. 113, 119, commenting on *Pyer v. Carter*, *supra*. And see also Judge Redfield's observations in Am. Law Reg., Jan. 1865, pp. 134, 135.

After this glance at the state of the adjudications, the question recurs, Is it a principle in our law that, if a man sells a house with windows and doors opening on to his vacant ground, he or his grantee cannot afterward build upon such vacant ground in such a manner as seriously to obstruct the flow of light and air to such house, without express reservation of the right so to do?

Did the question depend alone upon the authority of the English cases, it would have to be answered in the affirmative. It is justly observed by Mr. Washburn that the decisions as to implied easements of light and air are not uniform, nor in all cases satisfactory: *Easements*, 497, pl. 17. If it be held that there may be implied easements as to light and air,—as this implication arises wholly from the condition and circumstances of the estates to which the easement relates, and as this condition and these circumstances are almost infinitely varied,—it is easy to perceive the difficulties which environ the practical application of the doctrine.

Perhaps the law as to implied easements generally cannot be said to be fully settled, and this is particularly true in this country as to easements of light and air. The right to light and air seems in many respects to be different in its nature from easements relating to artificial erections on the servient estate, such as drains, gutters, pipes, etc., or rights of way, and

the like: See *Parker v. Foote*, 19 Wend. 309, *per* Bronson, J.; *Dodd v. Burchell*, 1 Hurl. & C. 113, 119, *per* Pollock, C. B.; *Haverstick v. Sipe*, 33 Pa. St. 368, 371, *per* Lowrie, C. J.

As to light and air, I am free to say that I do not believe the rule, as applied to our situation and circumstances, a sound one, which holds that under any circumstances this right can by implication be burdened upon an adjoining estate as to prevent the owner thereof from building upon or improving it as he pleases. I would reverse the rule, and hold that he who claims that the ten, twenty, or thirty feet adjoining him (which in cities may be very valuable) shall remain vacant and unimproved, should found such claim upon an express grant or covenant.

This rule is simple. Grantor and grantee would both know that the deed is the measure of their rights. Is it any hardship upon the purchaser to secure by express grant rights so valuable to him and so detrimental to his grantor,—rights which, unless limited and defined by written stipulations, are of uncertain extent and uncertain duration? See remarks of Patterson, J., in *Blanchard v. Bridges*, 4 Ad. & E. 176. Such a rule also harmonizes with the purpose of our registration laws. A denial of an easement by mere application, as respects light and air, may in my judgment well be, without denying that other easements of a different character may, and in some cases should, be held to exist by implication.

But in the case at bar the court do not regard it as necessary to deny the general doctrine contended for by the plaintiff's counsel.

The doctrine of implied easements rests upon the supposed intention of the parties as deduced from the situation and condition of the two estates to which the easement relates. An easement may be briefly defined to be a charge or burden upon one estate (the servient) for the benefit of another (the dominant).

In this case, it would be a burden upon the estate retained by Robinson, and afterward sold to the defendant for the advantage of the plaintiff's estate. This burden or servitude is, that this should remain vacant, if to improve it would materially obstruct the passage of light and air to the plaintiff's store.

Now, the circumstances surrounding this transaction make it quite clear that it was never intended that this easement should exist. In discussing a similar question, Mr. Justice

Story well remarks, "that in the construction of grants the court ought to take into consideration the circumstances attendant upon the transaction, the particular situation of the parties, the state of the country, and the state of the thing granted, for the purpose of ascertaining the intention of the parties": *United States v. Appleton*, 1 Sum. 492, 520; see also 2 Washburn on Real Property, 26; Broom's Legal Maxims, 261; Washburn on Easements, 36, pl. 12; *Karmuller v. Krotz*, 18 Iowa, 352; *Haverstick v. Sipe*, 33 Pa. St. 368, 371.

The first circumstance we refer to as evincing this intention is the language and character of the conveyances to the plaintiffs. These conveyances contain express language as to several easements. The right of way is an easement. And in the deeds to both plaintiffs that is expressly secured. The right to the use of the privy is an easement. And in both deeds it is stipulated for in terms. The right of Startzman to right of way on the east (two and a half feet in width) was an easement, as was also his right to extend the second story of his building over it. Both of these were provided for in express words in his deed.

And the same is true as respects the right of Morrison to the roof under the Downey contract with Robinson. This is also set down in his deed. Now, these are all easements, and are carefully secured by the deeds. If the parties had contemplated any other easement, such as the important one of light and air, would it not also most likely have been secured by the deed?

This will be more manifest by other considerations. We allude next to the character and situation of the buildings purchased by the plaintiffs of Robinson. They both fronted on Washington Street, which was one hundred feet wide. Morrison's store (No. 7 on the plat) was built by Robinson; that is, the first and second stories were built by him, and the third story by Cook, S., and Downey, in conjunction with him. It is only fifty feet deep and seventeen feet wide inside. The stories are about fourteen feet high. The front in the first story is an open one, composed of glass and iron, the windows being show windows ten feet high with two sets of lights each. In the rear of the first story was one door and one window, beyond which extended the eleven feet embraced in defendant's original purchase, which was prior to Morrison's purchase. The rear cellar window was very small, about eighteen inches or two feet square, with but two or three

inches above the ground. There was a front cellar window, and the outside entrance to the cellar was in front. The second story had two large windows in front and one in the rear. When Morrison bought, the only access to the second story was by a stairway in the rear of the first story. The first and second stories had one room each, and were "finished off for one storeroom, counter and shelves below and shelves above." Such was the condition when Morrison purchased. Since then, Morrison has entirely changed the interior arrangement. The stairway to the second story has been removed; an entrance has been obtained to the second story from the west; the second story has been partitioned off into two rooms, and is used for offices, the rear window being relied on for light to the back office.

When Startzman purchased No. 8, there was upon it a one-story frame house with an open front, and with an addition extending back to near the south line. In the rear there was but one small window of but six or eight panes of glass. This old building was removed, and the present structure erected by Startzman, with an open front like Morrison's in the first story, and three windows in the front of the second story. In the rear of the first story there is a sash door and a large window. It is proper to observe that Robinson knew when he sold that Startzman intended to replace the frame building with a new structure. These circumstances have been mentioned for the purpose of showing that these buildings, for the purposes for which they were erected, and in the condition in which they were sold, were not essentially dependent upon the rear windows for light: See Washburn on Easements, 504, pl. 26; 502, pl. 20; *Blanchard v. Bridges*, 4 Ad. & E. 174; *Fifty Associates v. Tudor*, 6 Gray, 255, approving *Back v. Stacey*, 2 Car. & P. 465; *Parker v. Smith*, 5 Id. 438; *Pringle v. Wernham*, 7 Id. 377; *Wells v. Ody*, 7 Id. 410, and recent English equity cases before cited, as to what amount of light a party is entitled to under an implied grant or prescriptive right.

If not thus dependent upon the rear openings for "such an amount of light and air as is reasonably necessary to the comfortable and useful occupation" of the building, the necessity for an implied grant does not exist, and the presumption that there was such a grant is very much weakened, if not entirely overthrown.

Surely such an easement, uncertain in its extent and duration, without any written or record evidence of its existence,

fettering estates, and laying an embargo upon the hand of improvement which carries the trowel and the plane, and, as applied to a subsequent purchaser, against the spirit of our recording acts, and not demanded by any consideration of public policy, — surely such an easement should not be held to exist by mere implication, when such implication originates in no reasonable necessity. Mr. Washburn, assuming that there may be an implied grant of such easements, observes that “the test seems to be whether what is claimed is reasonably necessary to the enjoyment of the part granted, and where that is not the case, it requires descriptive words of grant in the deed to create an easement in favor of one part of a heritage over another”: *Easements*, 61, pl. 42; 36, pl. 12; 504, pl. 26.

Again he says the implied easements (according to the tendency of the cases) will be held not to exist, except in instances where if the grantor were to build on his vacant land, the owner of the house would be “virtually deprived” of the enjoyment thereof: *Id.* 502, pl. 20.

But there are other strong circumstances in the situation of the property against the existence of the supposed easement. Defendant, who now proposes to build, purchased his store (No. 4) before Morrison did, and at the same time purchased eleven feet in the rear. This eleven feet extended east beyond the rear window of Morrison. Robinson retained no rights in this eleven feet. Could not defendant at once have built upon this eleven feet, although it should obstruct the light to store (No. 7) still retained by Robinson?

Plaintiffs' counsel have seen the importance of this point, and argue that the defendant could not build on the eleven feet so as to darken the windows in No. 7, even though Robinson were yet the owner thereof. In their written argument they say: “The doctrine of implied reservation keeps almost equal pace with and is as fully recognized as that of implied grant. The rule is, that if a man have a house with lights, and sell the same, but retain the land adjoining, he may not build thereon to the damage of the lights in the house sold; so if he sells the land, and retains the house, the purchaser may not build hereon to the damage of lights of the house.”

Such, it seems to us, cannot be the law. Such a doctrine as applicable to cities would be intolerable. The vendor sells the land, makes no reservation of any rights therein, parts with his dominion over it, receives his pay for it, and when his vendee

proposes to build, he stays his hand with an implied reservation, and the vendee finds that he has made a barren, unprofitable purchase; that he owns and pays taxes upon a lot to afford the vendor an unobstructed supply of air and sunlight. Lord Holt denied such to be the law, in *Tenant v. Goldwin*, 2 Ld. Raym. 1093, and his opinion was recently (A. D. 1862) approved by the court of exchequer, in *White v. Bass*, 7 Hurl. & N. 722, denying the doctrine of implied reservation of an easement for light: See also *Curriers' Co. v. Corbett*, 2 Drew. & S. 355; *Suffield v. Brown*, 10 Jur., N. S., 111; *Crossley v. Lighttower*, L. R. 2 Ch. App. 478, 1866; Washburn on Easements, 35, pl. 11; Id. 494, pl. 10; *Johnson v. Jordan*, 2 Met. 234; *Haverstick v. Sipe*, 33 Pa. St. 368, 1859.

Therefore the defendant had the right to build and darken the rear window of No. 7, and Robinson could not resist it. His right, then, to build was not affected by the subsequent sale of that store by Robinson to Morrison. This being so, there was no implied grant in the sale to Morrison from Robinson, that the windows should remain unobstructed by buildings in the rear. The store of Startzman was not then erected. Although Robinson knew he intended to build, there is no evidence that he knew such building when erected would essentially or reasonably need light and air from the rear; and hence it seems difficult to say that there was an implied grant of such an easement. This consideration alone, it seems to us, is conclusive against the claim of Startzman. Another and quite important circumstance against the implied easement of light and air over the entire vacant ground owned by Robinson at the time of his sales to the plaintiffs is the express grant of a four-foot right of way. This has before been alluded to in respect to other questions in the case.

In all the cases we have examined, in which an implied grant of light and air has been recognized, the house sold and the land to which the easement has been attached were adjoining: See *Palmer v. Fletcher*, *Cox v. Mathews*, *Roswell v. Pryor*, and other cases before referred to and stated.

We have found no case, although we have directed particular attention to the point in which an implied grant of light and air has been holden to exist when the vendor, at the time of the sale of the first parcel, laid out a space or passage between it and the portion of the heritage or estate retained by him. The servient tenement is thus disconnected from the dominant. It is argued by plaintiffs' counsel that this is sim-

ply a way, and has no reference to light and air. So is a street or an alley a way; but it is also an open space which admits the flow of light and air. The object of this way in the present case was to secure a passage to the privy, also an outlet through the right of way on the east, and possibly a right of way to the contemplated ten-foot alley, and also to secure the plaintiffs' estate against the erection of buildings nearer than the four feet. If the *aliunde* testimony is competent to show the purposes for which the private way was laid out by Robinson, it shows that these were the purposes.

Without positively deciding that there may not, under any circumstances, be an implied easement of light and air, we hold that the circumstances before enumerated negative any such implication or easement in the case under consideration.

3. The next and only remaining question relates to the plaintiffs' rights in respect to the privy. This was situated on land owned by Robinson at the time he sold to the plaintiffs, and it adjoined the private way in the rear of their stores. The plaintiffs' deeds, in express terms, granted to them "the right to the use of the privy." The right was embraced in the consideration paid for the property. It was not revocable at the will of Robinson or his grantee. It would exist at least as long as the privy should stand and have a right to stand. Defendant purchased the land upon which it was situated, and removed it at night, without the consent of the plaintiffs. He justifies this act upon two grounds: 1. He claims that the vault was full, and hence the easement was at an end; 2. If this is not so, he claims the structure had become a nuisance, and therefore he had a right to abate it, and he abated it by removing it.

The first ground is not supported by the evidence. The vault was not entirely filled, and if it were, we think the plaintiffs might, if they saw proper, remove the contents and thus continue the right to the use of the structure. The point is made that it was Robinson's duty to keep it in order, and that the defendant, by his purchase, takes Robinson's place. But the deed is silent upon this point, and it is not essential to determine upon whom the duty of keeping it in order would rest: See Washburn on Easements, c. 6, sec. 1, p. 564. Nor do we think the defendant was justified in removing it with strong hand and against the plaintiffs' wishes, on the ground that it was a nuisance. A party may, with his hand, abate that which is to him a nuisance, but such abatement does not

consist in the destruction of the property unless such destruction be absolutely necessary. It is the offensive use of it that he is justified in abating: *Barclay v. Commonwealth*, 25 Pa. St. 503 [64 Am. Dec. 715]; 2 Hilliard on Torts, 95. Plaintiffs asked to try disinfectants. Defendants refused, claimed the right to remove it, and did remove it the same night.

The right to the use of this outhouse was property; and the plaintiffs' right could not be thus summarily determined by the defendant. Defendant claims that the plaintiffs' right to use the privy ended when Robinson conveyed to him; that the grant of the use is not a covenant running with the land. The plaintiffs' rights were in the nature of a burden upon the estate on which the privy stood. The conveyance to the defendant of the estate did not disburden it of this servitude; particularly is this so, as the deed to the defendant is expressly made subject to the plaintiffs' rights.

Again, the defendant claims "that whether it was removed legally or illegally, the destruction of the privy extinguished the easement." If the plaintiffs had destroyed it, this might well be held to extinguish the easement; but not when such destruction is by the party owning the estate which owes the servitude. The law holds out no such bonus for the commission of torts; nor does it allow a party to gain and base a right upon an illegal act.

Again, it is contended that, being destroyed, the only remedy of the plaintiffs is an action for damages, as the court has no power to restore the privy. But it has the power to order the defendant to restore it, or to allow this to be done by the plaintiffs at his expense.

As respects the privy, we think the plaintiffs have a right, under the circumstances above stated, to be put *in statu quo*. The cause will be remanded, with directions to the court below to dismiss the plaintiffs' bill, except as to the rights in relation to the privy; to enter a decree that defendant shall restore this, or in default thereof that plaintiffs may do so, and the expense, or so much thereof as may be equitable, to be charged to the defendant. The decree will also enjoin the defendant from erecting his proposed building so as to interfere with the site of the privy. Plaintiffs may, if they elect, claim damages, and waive the right to a restoration of the privy. All rights in relation to the supposed ten-foot alley on the east of the premises to remain open, not being embraced in this adjudication.

Reversed.

DEDICATION, UPON WHAT FOUNDED, AND WHAT CONSTITUTES: *Heirs of David v. New Orleans*, 79 Am. Dec. 586, and cases collected in note 591; *Sarpy v. Municipality No. 2*, 61 Id. 221; *O'Neill v. Annett*, 72 Id. 364; *Gentleman v. Soule*, 83 Id. 264, and cases collected in note 268.

EASEMENT BY IMPLICATION: See *Burden v. Stein*, 62 Am. Dec. 758; *Hammond v. Woodman*, 66 Id. 219; *Carbrey v. Willis*, 83 Id. 688; *Seymour v. Lewis*, 78 Id. 108.

ABATEMENT OF NUISANCE BY PARTY AGGRIEVED: *Stiles v. Laird*, 63 Am. Dec. 110; *Mohr v. Gault*, 78 Id. 687.

DESTROYING BUILDING FOR BEING NUISANCE: *Barclay v. Commonwealth*, 64 Am. Dec. 715, and note.

THE PRINCIPAL CASE IS CITED to the point that an easement in light and air, to be supplied to the ancient windows of one person from the premises of another, cannot be acquired by mere use or prescription, in *Stein v. Hauck*, 56 Ind. 68. And to the point that in the sale of a house and lot no easement for light and air can be implied from the character of the improvements on the lot sold and the adjoining lot, in *Keiper v. Klein*, 51 Id. 320. As to grants of easements by implication, it is cited in *Wetherell v. Brobst*, 23 Iowa, 591. And to the point that a dedication of lands may be made by parol, and that the mere oral declarations and acts of the owner will warrant the presumption of a dedication, though followed by public enjoyment for ever so short a time, in *Fisher v. Beard*, 32 Id. 352.

DEFORD v. MERCER.

[24 IOWA, 118.]

CORRECTION OF MISTAKE IN DESCRIPTION OF LAND, PRESUMPTION AS TO. —

Where it is shown that a mistake in the description of the lands in a guardian's petition for the sale of his wards' real estate was corrected after the petition was draughted, it will not be presumed, in the absence of evidence, that such correction was not made until after the petition was filed.

HEIRS ARE ESTOPPED FROM QUESTIONING VALIDITY OF GUARDIAN'S SALE of their interest in certain lands on the ground of a defect in the proceedings, where, after becoming of age, with full knowledge of all the facts, and in the absence of fraud and mistake of fact, they receive and retain the purchase-money arising from such sale; and this principle applies even where the sale is void.

COURT OF EQUITY WILL REFORM MISDESCRIPTION IN CONVEYANCE founded on a consideration, though the deed is a quitclaim, and contains no covenants.

PETITION in equity. The plaintiffs, being the heirs at law, and the assignees of such heirs, of one Pursley, claimed title to a certain tract of land, of which the said Pursley was owner at the time of his death. The land had been sold by one Jones as guardian of the minor heirs of the said Pursley, and the defendants claimed title to a portion of the land under

such sale. The plaintiffs' petition attacked the validity of said sale, and prayed to have it set aside, which prayer the court denied, and accordingly confirmed the title of the defendants to the property in question, and the plaintiffs appealed. Other facts appear in the opinion.

B. N. Kinyon, for the appellants.

Polk and Hubbell, for the appellees.

By Court, DILLON, C. J. It is not necessary to discuss or examine any questions respecting the guardian's sale, which were decided in the case of *Pursley v. Hayes*, 22 Iowa, 11 [*ante*, p. 350]. That case was very elaborately argued and deliberately considered. Under the course of decision in this state respecting administrators' and guardians' sales, it was held that the sale by Jones, as guardian, was valid as against the various objections in that case made against it. This cause has reference to another tract of land of which the said Hugh Pursley, deceased, was, at the time of his death, the owner; but this tract was sold by the said Jones under the same order or license of the county court (August 3, 1852), referred to in the Hayes case.

The land owned by Pursley and claimed in the present suit is the southwest quarter of the northeast quarter of 5, etc. It is claimed that Jones's petition, as guardian, for an order to sell, described the land as the southwest quarter of the northwest quarter of 5, etc.; and that after the said petition of the guardian to sell was filed, and after notice was served on the wards, if not indeed after the order of sale, the description was fraudulently or without authority changed by erasing the word "west" and inserting the word "east."

Testimony was taken on this point, but while this establishes that the change was made after the petition was draughted, it does not clearly satisfy us that it was made after it was filed. The mistake in the description was probably discovered before the filing of the petition of the guardian to sell, and corrected prior to such filing, by erasing the word "west" and inserting the word "east."

But the same mistake was omitted to be corrected in the copy of the petition which was served upon the wards. The mistake occurred by following the like mistaken description in the deed from Abel J. Cain to Hugh Pursley, of date August 16, 1849. The notice to the wards (which notice was indorsed upon a copy of the petition, which copy described

the land as the southwest quarter of the northwest quarter, etc., instead of the southwest quarter of the northeast quarter, etc.) contained a material mistake in the description of the land; it was a mistake because it described lands in which the wards had no interest, but it also describes them as those conveyed to the said Hugh by the said Cain. Admitting, as for the purposes of this case we do, that the effect of this misdescription of the land would be to enable the wards to avoid the sale, yet there are other facts, which we now proceed to state, that equitably and effectually estop them from claiming title to the land. The answer alleges and the evidence establishes (indeed, the fact is not disputed) that all of the wards of the said Jones, after they became of age, with full knowledge of the fact of the sale, and that he had no money except such as arose from this sale, received from and re-ceived to him for the purchase-money of the property sold by him as guardian.

Not only so, but they received this money from their guardian after this suit was brought, a suit which directly attacked and put in issue the validity of the guardian's sale. Such alleged invalidity is, indeed, made the groundwork of the relief herein sought. Not only so, but the testimony shows that they knew the money arose from the sale, among other tracts, of this very land; that Jones had no other money in his hands except such as he had received from the sale made by him as guardian; and this money the said heirs (the present appellants on the record) not only still retain, but they have never tendered it back to Jones or his vendees. It is not shown or claimed that any fraud was practiced upon them to induce them to receive the money. On the contrary, it seems that they were anxious to get it just as soon as was practicable after attaining their majority.

It is not shown that they received it under any mistake of fact, nor that they received it under any misapprehension as to their legal rights.

Under these circumstances, if there is anything well founded in conscience or in law, it is that they are estopped in equity from claiming the land after having voluntarily accepted the money which arose from or was the product of the sale of the land.

We can only account for the action of the heirs in thus receiving the money by supposing the testimony to be true, that in case there was a recovery they were to have only a portion

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thereof; that the rest was to go elsewhere; and that they were unwilling to give their undisputed right to the money arising from the sale for their disputed right to recover the land. But however this may be, it is certain that the present appellants have, under the circumstances before stated, voluntarily received from Jones, their guardian, the purchase-money for the very land they are now seeking to recover.

That they are not entitled to, and cannot have, both the money and the land, is a proposition which seems too plain to require either an extended argument or authority to show. We have so held in a former case arising upon the same sale: *Pursley v. Hayes*, 17 Iowa, 310. If the brief opinion filed in that case is closely examined, it will be seen that the propositions on which it rests are guardedly stated. That opinion is certainly correct. There is nothing in the circumstances of the present case which requires us to decide more than that where a party, with full knowledge of all the facts, there being no fraud or mistake, and nothing to repel the presumption that he knew his legal rights, but much to show that he did fully know them, voluntarily accepts and retains the purchase-money arising from the sale of his land, he cannot afterward claim the land itself. He is equitably estopped to deny the validity of the sale. When this question was before us previously, in *Pursley v. Hayes*, 17 Iowa, 310, we did not deem it necessary to fortify our conclusion by a citation of adjudged cases in other courts.

As the question has been again brought up, we subjoin a reference to some decisions not only holding the same view, but even going much further than we are required to do by the facts of the cause now under consideration.

It will be seen that this principle of estoppel is not limited, as contended for by the appellant's counsel, to cases of voidable sales, but extends to cases where the sale is void.

If it were true that through mistake the land by a wrong description was embraced in the order of sale, but the right land was sold and conveyed, even then a receipt of the purchase-money under the circumstances shown in this case, and above referred to, would estop the parties so receiving it from claiming the land. The heirs who received the money have not testified, nor in any other way shown, that they received it under any mistake of fact, or in ignorance of their legal rights, or by reason of any fraud. This money they still retain, and do not offer to restore it. As they have chosen to

take the money, they cannot also have the land. The decree of the district court dismissing their petition is therefore affirmed.

2. Mrs. Deford, one of the plaintiffs, conveyed her interest as one of the heirs of Hugh Pursley, to her uncle (West). The circumstances under which and the consideration on which this conveyance was made are stated in *Pursley v. Hayes*, 22 Iowa, 15-18 [*ante*, p. 350]. She conveyed by the same mistaken description by which Abel J. Cain conveyed (August 16, 1849) to her father, Hugh Pursley. That is, the land was described as the southwest quarter of the northwest quarter instead of the southwest quarter of the northeast quarter, etc.

That this was a mistake in the deed from Cain to Pursley, and a like mistake in the deed from Mrs. Deford (formerly Mrs. Cain) to West, is clearly established. Defendants claim under the title thus acquired by West, and by their cross-bill ask that this mistake be corrected. The court below decreed accordingly, of which Mrs. Deford complains.

The point made and pressed by her counsel is, that Mrs. Deford's deed to West was only a quitclaim, was purely voluntary, and hence the court could not properly decree a correction of the same.

That it was not a voluntary conveyance, see *Pursley v. Hayes*, 22 Iowa, 16 [*ante*, p. 350]. She received a consideration for it, — a consideration equaling at the time the value of the interest conveyed. There was no fraud. She executed the deed, and delivered it after she became, by the death of her husband, discoverer. She intended to convey her interest in the land which her father owned at the time of his death, not in that to which he had no claim of title. A mistake crept into the deed by which she sought to execute this intention. Why should she profit by it? Why should she not correct it? We see no such reason in the mere fact that her conveyance was without covenants. The decree below, in this respect, was correct.

3. The point that the guardian's deeds are void for uncertainty of description has, in effect, been already decided: 22 Iowa, 39.

Affirmed.

Steenrod, 71 Id. 447, and note 453; defect in sale, how cured: *Emery v. Vroman*, 88 Id. 726; infant must have opportunity to correct errors in: *Gibson v. Roll*, 81 Id. 219; misdescription of part of land in petition is valid for the part correctly described: *Frazier v. Steenrod*, 71 Id. 447.

ESTOPPEL TO DENY TITLE ARISES WHERE WARD ENJOYS PROCEEDS OF SALE: *Penn v. Heisey*, 68 Am. Dec. 597.

THE PRINCIPAL CASE IS CITED TO THE second point stated in the *syllabus*, and the principle followed, in *Rump v. Schwartz*, 67 Iowa, 474.

SHANKS v. SEAMONDS.

[24 IOWA, 181.]

FATHER HAS NO POWER BY VIRTUE OF BEING NATURAL GUARDIAN OF MINOR CHILD to sell or dispose of the latter's real estate, it not appearing that he was appointed guardian of the property of such child, or that he complied with the statutory requirements relating to guardian's sale.

DEED MADE BY FATHER AS NATURAL GUARDIAN OF MINOR CHILD, PURSUANT TO SALE OF LATTER'S REAL ESTATE, without legal authority, will not estop a third party from setting up a title to the land derived through a deed from the father himself, who became seised of the land by inheritance from the child, whose death occurred subsequent to the alleged guardian's sale; nor would such third party be so estopped by a failure to object before his purchase to improvements being made upon the land by the persons claiming title thereto through the alleged guardian's sale.

REAL action. The land in dispute was once the property of the infant child of one Zuber, and the defendants claimed title under a deed made by the father as the guardian of such child. The plaintiffs claimed under a deed from the father, to whom the property descended on the death of the child, provided the title was not divested by the guardian's deed. Judgment was for the plaintiffs, and the defendants appealed.

C. E. Millard, for the appellants.

J. M. Dewe, for the appellees.

By Court, WRIGHT, J. Plaintiffs' legal title seems to be well and sufficiently sustained, and must prevail unless the equities set up by defendants are sufficient to defeat it. And here we are called upon chiefly to consider and determine the effect due to the alleged guardian's sale.

Without setting out the facts, we remark that this title has nothing whatever upon which to stand. In January, 1862, the records of the county court recite, that upon the petition of

J. J. Zuber, natural guardian of Alice M. Zuber, to sell real property belonging to her, the court ordered the guardian to sell said property (describing that in controversy) at private sale, etc. Beyond this there is nothing whatever to show that the father ever was appointed guardian; that he ever filed a petition to sell; that he ever gave notice of such application; that he ever sold or conveyed the property by virtue of this authority; that he made any return or settlement as guardian, nor that he took any other step in relation to the property of the ward. Indeed, it quite conclusively appears that he never was appointed guardian, and never had authority as such to dispose of this property. Not only so, but it is left in much doubt whether he ever executed or delivered a deed of any kind to the party under whom defendants claim. On the other hand, plaintiffs show the death of the child, the descent to the father, and a deed in due form from him to them. Upon these facts, there can, of course, be no question as to what party has the legal title. And under them there can be as little doubt, when we turn to equities insisted upon by defendants.

If the father never made a deed as guardian, he of course would not be estopped from denying defendant's title. And this would be more emphatically true of plaintiffs, who take title from him. Not only so, but a deed by him as natural guardian, made without authority, without right, and in the absence of all right or authority, for which nothing was ever received or pretended to be received by the ward, made, if for anything, in consideration of an old debt of the father, would not estop these plaintiffs from setting up title derived from him in his own right. If there was any fraud on the part of Zuber, plaintiffs are not connected with it, and hence not affected by it.

And the alleged knowledge on the part of plaintiffs that defendants were putting improvements upon the lot, and that the husband had entered into and had a contract for erecting the building thereon, though ever so fully established, is of but little moment, for two most cogent reasons. In the first place, defendants were advised and told at the time of building that they had no title, and in the face of this information proceeded with their improvements. Then again, plaintiffs then had no title, and did not acquire any for near a year afterward. Of course, therefore, any silence on their part before acquiring title, if shown, would not estop them from setting up that subsequently acquired. And the same is true of the alleged sale by

plaintiffs to defendants of the deed from Remick (who once held the title) to the person under whom both parties claim title. This transaction was long before plaintiffs had any title, and o utterly barren of everything like a sale of the property that we cannot imagine any single ground upon which it could be claimed that defendants acquired any rights under it.

This judgment must therefore be affirmed. What rights, if any, defendants may have for improvements as occupying claimants, we are not now called upon to determine.

Affirmed.

GUARDIANSHIP BY NATURE GIVES NO RIGHT TO INTERMEDDLER WITH INFANT'S PROPERTY: *Haynie v. Hall*, 42 Am. Dec. 427, and note; *Linton v. Walker*, 71 Id. 105.

ESTOPPEL BY DEED: See *Baxter v. Bradbury*, 35 Am. Dec. 52, note.

CASES
IN THE
COURT OF APPEALS
OF
KENTUCKY.

XXX BOWLIN v. COMMONWEALTH.

[2 BUSH, 5.]

STATE MAY REGULATE HER DOMESTIC CONCERNS, AND PRESCRIBE REMEDIES,
including rules of evidence, in her own courts, except where prohibited
by her own constitution or that of the United States.

CONGRESS OF UNITED STATES CANNOT REPEAL OR MODIFY LAW OF STATE
on the subject of negro testimony.

NEGRO IS INCOMPETENT TO TESTIFY AGAINST WHITE MAN under the laws
of the state of Kentucky.

INDICTMENT for grand larceny. The opinion states the facts.

Z. Gibbons, for the appellant.

John M. Harlan, attorney-general, for the appellee.

By Court, ROBERTSON, J. William J. Bowlin, a free white man, indicted for grand larceny in the Fayette circuit court, being sentenced to the Kentucky penitentiary for five years on the testimony of George Gardner, a free negro, appeals to this court for a reversal of the judgment of conviction, on the ground that the circuit court erred in admitting, against his protest, the said evidence as competent.

By the first section of chapter 107, Stanton's Revised Statutes of Kentucky, page 470, it is enacted: "That a slave, negro, or Indian shall be a competent witness in a case of the commonwealth for or against a slave, negro, or Indian, or in civil cases to which only negroes or Indians are parties, but in no other case."

And this enactment, never having been repealed by Ken-

tucky, is now the law ruling this case in this court, unless it has been abolished by the first section of the civil rights bill, whereby Congress enacted: "That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right in every state and territory in the United States to make and enforce contracts, to sue, be parties, and give evidence, inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of persons and property, as is enjoyed by white citizens; and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding."

This enactment evidently applies to all courts, state or federal. If Congress had constitutional power to repeal or control the Kentucky law, *supra*, the foregoing act for legalizing the testimony of free negroes in all cases is the law of this case, and the circuit court did not err in admitting the evidence of George Gardner; but if there was no such power, that enactment was a mere *brutum fulmen*, and not law, and the admission of the testimony consequently was erroneous. However anarchy may in fact have lately predominated without the practical control of fundamental principles, the constitution of the United States is still rightfully the supreme law of the land, and as supreme over the will of Congress as it can be over that of the President, or of any citizen or party.

Each state, so far as not prohibited by her own constitution or that of the United States, has the unquestionable right to regulate her own domestic concerns, and prescribe remedies, including rules of evidence, in cases in her own courts; and we presume that Congress would never assume authority to regulate the testimony of free white citizens in state courts. The civil rights bill has attempted no such presumptuous absurdity. Then, whence does Congress derive its asserted authority for class legislation, applicable to the evidence of the colored race alone, and whereby negroes might be made competent witnesses in cases in which, by the local law of the forum, white persons are made incompetent?

The only possible source of such anomalous power must be the constitutional amendment for abolishing slavery, in the following words:—

“Sec. 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

“Sec. 2. Congress shall have power to enforce this article by appropriate legislation.”

The utmost legal effort of the emancipating section was to declare the colored as free as the white race in the United States. It certainly gave the colored race nothing more than freedom. It did not elevate them to social or political equality with the white race. It neither gave nor aimed to give them, in defiance of state laws, all the rights of the white race, but left them equally free in all the states, and equally subject to state jurisdiction and state laws. Without the second section, therefore, there could be no pretext for a claim by Congress for special legislation for the colored race which would be unauthorized in relation to the white race of freemen.

And whatever may have been the unspoken aim of the second section,—to secure the only end of the first section,—freedom to all, and nothing more, was the only constructive object, and is the inevitable effect of this section. Notwithstanding the abolition of slavery, a state in which freedmen reside might attempt their disfranchisement, or withhold from them the privileges of free men.

To prevent any such frustration of the aim and effect of the declared emancipation was obviously the object, and must be the only legitimate effect, of the second section. “Power to enforce this article by appropriate legislation” can import nothing more than to uphold the emancipating section, and prevent a violation of the contemplated liberty of its enfranchised race. It could not mean that Congress should have power to legislate over their civil rights and remedies in the states any more than over those of all other citizens; and it certainly does not squint at any such legislation as to white citizens. If it authorize Congress to make freed negroes competent witnesses against white citizens in state courts in opposition to state laws, it not only means more than could ever become necessary for the simple purpose of upholding, against the interfering will of states or of white citizens, the declared emancipation, but would place the black race, in all the states,

under the pupillage of Congress, free from the control of the local sovereign that governs the white race, and ought to have the same jurisdiction over all citizens, black as well as white.

Such an absurd anomaly as the legislation by Congress for one portion of the citizens of the same state, and the legislation by the state for another portion of her citizens, could never be tolerated by any statesman or jurist. And moreover, if such an absurdity could be admitted, the power of Congress in relation to the black race might not only be practically exclusive, but, to a great extent, might abrogate the power of the states in relation to the white race. Such a monstrous construction of the second clause would yield to the arbitrary will of Congress absolute control over the interests and destiny of the black race, and the like control over the white race, so far as its rights might in the opinion of Congress conflict with the interest of the blacks. And on this theory Congress might take from white citizens their property and give it to black citizens; and might, as assumed in the civil rights bill, legislate over all contracts in the states to which black citizens are in any way parties. And the unqualified "same power to make and enforce contracts," attempted to be given by that bill to black citizens, would legalize intermarriages between the two races, deteriorating to the Caucasian blood, and destructive of the social and legislative decorum of states. But that is as constitutional as the provision for regulating negro evidence,—both requiring the same unwarrantable assumption.

Surely no such federal legislation could be either necessary or "appropriate" to "enforce" the "article" of emancipation as contemplated by the second section; but if that section authorize Congress to repeal state law as to negro testimony, it must, on the same vagrant assumption, vest Congress with unlimited power over one class of the citizens of each of the states. This argument *et absurdo* seems logical and the conclusion inevitable; and our interpretation of the second section accords also with the significant fact that any interpretation of it more latitudinarian was, in and out of Congress, disclaimed by its leading advocates during its probation before its final ratification.

Without elaboration of what seems to this court a self-evident proposition, we conclude that Congress had no constitutional authority to repeal or essentially modify the law of Kentucky on the subject of negro testimony; and that con-

sequently our own state law is the only law of this court, and must rule this case.

George Gardner was, therefore, incompetent to testify against the appellant, and the circuit court erred in admitting his testimony.

Wherefore the judgment of conviction is reversed, and the cause remanded for a new trial.

WILLIAMS, J., delivered a concurring opinion. The only question in this case, he said, is as to the competency of the witness George Gardner, who is a free man of American descent. After stating the facts and reciting the Kentucky statute set out in the principal opinion, under which it was claimed the witness was incompetent, he continued in substance as follows:—

The decision of the circuit court in permitting the witness to testify is attempted to be justified under the provisions of the act of Congress, known as the civil rights bill, which is recited in the principal opinion. There is nothing in this act whatever which makes or attempts to make it obligatory on state courts or officers to enforce its provisions. As it has been uniformly held by the United States supreme court, that Congress cannot enforce on state officers or courts the administration of its laws, this act must be construed as applying to United States courts and officers alone, especially in view of the absence of any explicit provision imposing this duty on the state judiciary and officers. It is true that this act provides for the punishment, as a misdemeanor, of the action of any person in subjecting an inhabitant of any state or territory to deprivation of any right under the act, or to different punishments, pains, and penalties on account of his previous condition of slavery or servitude, or on account of his race or color, from those imposed upon others. It further provides, however, that federal, to the exclusion of state, courts shall have jurisdiction of such offenses, and of all actions, civil or criminal, affecting persons belonging to the classes mentioned in the act who are denied any of the rights secured to them thereby. Therefore, and also by virtue of the express provisions of the act, any party belonging to these classes may, if he be a defendant, remove the cause to the federal courts, or if he be a plaintiff, select his forum in which to prosecute it. But in the whole act of Congress there is nothing which can be construed as embracing the state judiciary, and the whole statute is merely for the administration of the federal courts and directory to the federal officers. And this must be correct if the decision in *Commonwealth v. Dennison*, 24 How. 95, is to be followed.

But conceding that state officers and judiciary are intended to be and are embraced in this congressional enactment, whence comes the constitutional power in Congress to impose such duties on the state or judiciary, and to pronounce penalties for their non-observance? Judge Williams, in considering this question, gives a summary of the manner of the formation of the government, the adoption of the federal constitution, the theory of representation of the states in Congress, and the arguments in the constitutional convention which led to the adoption of the existing basis of representation, all to show that it was the intention, as expressly provided in the tenth amendment to the constitution, that all rights not expressly conferred upon the federal government should be reserved to the states and the people, and that in regard to the rights so reserved, the states should be supreme. To show

this further, and to show the conflict of opinion as to the rights reserved, he recites some of the political history of the country; and to show the extent of the rights reserved, he refers to *New York v. Dibble*, 21 How. 370; and also quotes *in extenso* from *Albeman v. Booth*, 21 Id. 516. He then recites the constitutional provisions conferring jurisdiction upon the federal courts. From all of this he concludes that the federal government had not, under the constitution, in 1860, any power to impose upon state officers as such any duty, or if imposed, to compel them to perform it, citing *Commonwealth v. Dennison*, 24 Id. 66. Continuing, the judge said substantially: The remaining question is, whether what has been said is affected in any way by the thirteenth amendment to the federal constitution. The judge then referred to the debate upon the passage of this amendment, and showed that its sole object was the abolition of slavery, and that the second subdivision of the amendment, providing that "Congress shall have power to enforce this article by appropriate legislation," merely provided for the passage of such laws as would effectuate the abolition of slavery, and that it certainly was not intended by it to invade the reserved rights of the states, enter their courts, dictate rules of evidence, competency of witnesses, qualifications of judges, jurors, etc., or otherwise control internal legislation. This civil rights bill concerns not only persons in slavery, but "every person born in the United States," etc. Its provisions in regard to persons other than those in slavery cannot be brought within any provision of the constitution or its amendments. If, therefore, it were held to affect state courts and officers, it would be permitting Congress to go beyond the constitutional grant of power, and to invade the rights expressly reserved to the states by the constitution. Seeing, then, a total want of constitutional authority in Congress to enact such a law for the regulation of domestic concerns of the state, it is rational to conclude that they did not so intend. The admission of George Gardner to testify was therefore in violation of the laws of Kentucky, which are not repealed or modified by the civil rights bill, and indeed, cannot be by any act of Congress. The judgment should therefore be reversed, with directions to the court below not to admit Gardner to testify on another trial, if the defendant object thereto.

INCOMPETENCY OF WITNESS BECAUSE OF RACE, RELIGIOUS BELIEF, OR PREVIOUS CONDITION.—This topic involves two questions: 1. A question of evidence, as to whether persons are to be excluded as witnesses because of their particular religious belief, or want of it; and 2. A constitutional question, as to the power to exclude persons as witnesses because of race, color, or previous condition of servitude.

Religious Belief.—The oath was at the common law considered to be an essential prerequisite to the admission of a witness to testify. And on the authority of Coke, it had been assumed for a time that the only oath was the oath of a Christian, and that none but Christians were competent to testify: Coke on Littleton, 6 b. But in *Maden v. Cutanach*, 7 Hurl. & N. 360, Chief Justice Willes, upon the question being raised, said that the rule laid down by Coke was "without foundation in either Scripture, reason, or law; and that such infidels as believe in God, and that he will punish them if they swear falsely, may and ought to be admitted as witnesses." It may therefore be regarded as the rule of the common law, and the rule of the early cases in this country, that an atheist, or one who does not believe in the existence of a God, or a future state of existence, or punishments and rewards, is not competent to testify: *Maden v. Cutanach*, 7 Hurl. & N. 360; *Wakefield v. Ross*, 5 Mass. 16; *Beardsly v. Foot*, 2 Root, 399; *Atwood v.*

Welton, 7 Conn. 66; *Central R. R. Co. v. Rockafellow*, 17 Ill. 541; *Smith v. Coffin*, 18 Mo. 157; *Thurston v. Whitney*, 2 Cush. 140; *Norton v. Ladd*, 4 N. H. 444; *People v. McGarren*, 17 Wend. 460; *Anderson v. Maberry*, 2 Heisk. 653; *Arnold v. Arnold*, 13 Vt. 363; *Scott v. Hooper*, 14 Id. 535. In a number of cases the early rule laid down was that a witness was competent if he believed in a Supreme Being who dispenses retribution in this life alone: *Ormicland v. Barker*, Willes, 538; *United States v. Kennedy*, 3 McLean, 175; *Blocker v. Burness*, 2 Ala. 354; *Noble v. People*, 1 Ind. 29; *Hunscom v. Hunscom*, 15 Mass. 184; *Butts v. Smartwood*, 2 Cow. 431; *People v. Matteson*, 2 Id. 433; *Shaw v. Moore*, 4 Jones, 25; *Brock v. Milligan*, 10 Ohio, 121; *Cubbiason v. McCreary*, 2 Watts & S. 262; *Blair v. Seaver*, 26 Pa. St. 274; *Jones v. Harris*, 1 Strob. 160; *Bennett v. State*, 1 Swan, 111.

By statute, in most of the states, the requirement of a religious belief of any kind has been abolished, and a witness is not now disqualified who does not believe in the existence of a God or Supreme Being. A collection of references to the various constitutions and statutes which have produced this result will be found in 1 Greenl. Ev., sec. 369, notes 2 and a. Under a statute which provides that there shall be no religious qualification for witnesses, the court held in Kentucky that an atheist who believed it morally wrong to tell a lie, and recognized the obligation of an oath in every sense of the word, was competent: *Bush v. Commonwealth*, 80 Ky. 244; and so in *Londener v. Lichenstein*, 11 Mo. App. 385; *Fuller v. Fuller*, 17 Cal. 609; *People v. Jenness*, 5 Mich. 305; *Perry's Case*, 3 Gratt. 632.

An oath or affirmation, however, is always required of persons presented as witnesses; and if no religious requirement exists, it is said that it is still necessary that to be competent one must have a conscience alive to accountability to a higher power than human law, and regard solely for good of society or fear of earthly punishment is generally held not sufficient: *Commonwealth v. Winnemore*, 2 Brewst. 378.

Where a Chinaman did not know the name of the book upon which he was sworn, but believed that if he stated anything untrue he would be punished by some unknown power, he was held competent: *The Merrimac*, 1 Ben. 490. Where a Chinaman claimed to understand the nature of an oath, it was held that his capacity might be shown: *Green v. State*, 71 Ga. 487; *Williams v. State*, 12 Tex. App. 127. An Indian was asked if he understood the nature of an oath; his only answer to this and all questions was, that he intended to tell the truth. He was held incompetent: *Priest v. State*, 10 Neb. 393.

Where a religious belief or qualification is required, it is always presumed until the contrary is shown: *Donnelly v. State*, 26 N. J. L. 463. And it is generally held that a witness may not be interrogated as to his religion or belief: *Commonwealth v. Smith*, 2 Gray, 516; *Commonwealth v. Bachelder*, Thach. C. C. 191; *Donkle v. Kohn*, 44 Ga. 266; but it may be proved by other evidence, as, for instance, by proving his declarations: *Anderson v. Maberry*, 2 Heisk. 653. Where objected to on the ground of being a disbeliever, the witness has been permitted to state his belief, and if it stands uncontradicted, to testify: *Arnd v. Amling*, 53 Md. 192.

Race or Previous Condition. — It goes without saying, that a witness may be excluded, if the statute so provide, by reason of having been convicted of an infamous crime: 1 Greenl. Ev., sec. 372. But it is not so easy to determine the proposition ruled upon in the principal case, that is, whether the states may pass laws providing for the exclusion of certain classes of persons because of their race or previous condition. The matter is well reasoned in the principal case; and the decision is followed upon the same line of reason-

ing in *State v. Rash*, 1 Houst. 271, it being held that in regard to matters of evidence and procedure in their courts, the states are supreme. In the same state, however, and in a later case, *Hundy v. Clark*, 4 Id. 16, the contrary was held, but no reasons whatever are given for the opinion; whereas *State v. Rash*, *supra*, is a well-reasoned case, and likely to be of weight. In *People v. Washington*, 36 Cal. 658, the same civil rights bill considered in the principal case was held constitutional in regard to its effect upon the admission of evidence (the California statute having provided for the exclusion of Chinese as witnesses against whites); but this case was overruled and the state statute upheld in the later case of *People v. Brady*, 40 Id. 215. *United States v. Rhodes*, 1 Abb. 34, is a case relied on to support the constitutionality of the civil rights bill in this regard. This, however, was a case where the house of a negro was burglarized by a white man, and the negro was, under the statute, excluded as a witness. The real ruling was, that the negro, being deprived of his rights, might remove the case to the federal courts. This is within the reasoning of the principal case. It would seem from all the cases, and to be the better reasoning, that the states may provide their own rules of evidence; and that any person injured by any rule adopted, if he be within the acts passed in pursuance of the thirteenth amendment to the federal constitution, may obtain his rights by a removal to the federal courts.

LOWRY v. FISHER.

[2 BUSH, 70.]

RENEWAL OF PROMISSORY NOTE DOES NOT SATISFY DEBT, but merely operates to change the evidence of the debt, and will not destroy rights under it which the statute secures to creditors prior to a conveyance.

INTENT AND PURPOSE TO DEFRAUD ARE NECESSARY TO CHARACTERIZE CONVEYANCE AS FRAUDULENT; and therefore the mere fact that a man who makes a conveyance owes money will not render it fraudulent, although indebtedness to a large amount in proportion to the value of the grantor's estate may authorize the conclusion that his intent and purpose were fraudulent.

CONVEYANCE TO HIS CHILDREN BY ONE WHO IS INDEBTED in a large amount in proportion to the value of his estate is constructively fraudulent as to subsequent as well as pre-existing creditors.

UPON SETTING ASIDE OF HUSBAND'S CONVEYANCE AS FRAUDULENT and void, creditors are not entitled to a judgment for sale of the wife's dower in the land conveyed because she signed and acknowledged the deed with her husband.

SUITS to set aside certain conveyances as fraudulent. The opinion states the facts.

Hunt, Beck, and Clark, and Thomas P. Porter, for the appellant.

J. S. Bronaugh, for the appellees.

By Court, HARDIN, J. James H. Lowry, of Jessamine County, being the owner of about 1,424 acres of land, some

thirty-six slaves, and valuable personal property, the whole of the approximate value of one hundred thousand dollars, on the third day of March, 1859, conveyed to his son, James Knight Lowry, a tract of about 305 acres of the land as an advancement to him, at the estimated value of eighteen thousand six hundred dollars.

These several suits were brought in 1862 and 1863, to set aside said deed and subject the land to the satisfaction of various debts due from James H. Lowry to the plaintiffs originally, or which they had paid or were liable for as his sureties, upon the alleged ground that he was insolvent, and that the deed was made in fraud of their rights as his creditors and securities.

The judgment sought by the plaintiffs was resisted by both James H. and James Knight Lowry, who denied the alleged fraud in the execution of the deed, and insisted that at the time the deed was made the property given and conveyed by James H. to James Knight Lowry was not more than a proper and reasonable advancement to the latter, considering the circumstances of his father; and they further alleged that although the title to the land remained in J. H. Lowry till March 3, 1859, he had long before given it to J. K. Lowry, who was in possession at the date of the deed.

The circuit court, upon final hearing, adjudged that said conveyance was fraudulent and void as to the creditors of James H. Lowry, and directed a sale of the land to satisfy the plaintiff's debts, both antecedent and subsequent in date to the deed. And from that judgment James Knight Lowry prosecutes this appeal.

Of the debts asserted in the several suits, it satisfactorily appears that so much of them as amounted to near seven thousand dollars was created before the deed was made; and although there is some controversy as to whether some of the other debts were or not renewals of debts existing before the date of the conveyance, although evidenced by notes of a later date, the evidence conduces to show that a further portion of the debts, amounting to near nine thousand dollars, was of this description, while the balance of the claims, amounting to about four thousand dollars, originated after the deed was made.

By section 2 of chapter 40 of the Revised Statutes, volume 2, page 546, it is declared that "every gift, conveyance, assignment, transfer, or charge made by a debtor of or upon any of

his estate, without valuable consideration therefor, shall be void as to all his then existing liabilities; but shall not on that account alone be void as to creditors whose debts or demands are thereafter contracted, or as to purchasers with notice of the voluntary alienation or charge; and though it be adjudged to be void as to prior creditors, it shall not therefore be decreed to be void as to such subsequent creditors or purchasers."

It seems to us this statutory provision is fatal to the conveyance, so far as pre-existing debts are concerned. But it is insisted for the appellant that all those who assert claims of date subsequent to the 3d of March, 1859, are to be regarded as "subsequent creditors. within the meaning of the statute, no matter whether the debts themselves existed before that date or not; and we are referred to the case of *Castleman v. Holmes*, 4 J. J. Marsh. 1, as authority in support of this view. That was an action by a creditor of the Fayette Paper Manufacturing Company to compel the stockholders to contribute to the payment of a debt of the corporation, under a provision of the charter, which devolved the liability upon such persons as were stockholders at the time the debt was contracted to be paid. The debt was originally contracted by the company in 1816, and was several times renewed prior to the eighth day of December, 1819, when the note in contest was given.

The question then was, Who were liable to contribute to pay the debt,—the stockholders of 1816 or of 1819? and the court held that the latter were, because they composed the corporation when it last contracted to pay the debt. Conceding the general principle that the execution of a new note or promise to pay discharges the obligation of the old one, yet there are rights often arising out of the original transaction which adhere to the consideration, and are not extinguished by the renewal as the lien of a vendor, which is not impaired by the renewal of a note for purchase-money: *Honore v. Bakewell*, 6 B. Mon. 72 [43 Am. Dec. 147]. The renewal of a note is not a satisfaction of the debt; it is only a change of the evidence of the debt; and in this case, in our opinion, such renewal did not destroy the rights which the statute secured to the appellees as creditors of James H. Lowry prior to his conveyance to the appellant. This conclusion is fortified by the opinion of the supreme court of the United States in the case of *McLaughlin v. Bank of Potomac*, 7 How. 228, in which it is

said: "In our view, a pre-existing debt by a note which was only renewed afterwards, with the same indorsers, continued to be the same pre-existing debt for this purpose as it stood originally, both as to the maker and indorser. They both regarded it virtually as the same, as no new consideration ever arose between the parties, especially on the equity side of this court and of the circuit court below, where the question arises. Such a case ought to be regarded as much within the mischief of the statute against fraudulent conveyances, as if the action leading to judgment against the administrator had been on the original indorsement of the original note."

But the validity of the deed is assailed by the appellants, not only because it is a voluntary conveyance without consideration, but on the further ground that it was made with the fraudulent intent to hinder and delay the grantor's creditors, and is consequently invalid as to subsequent as well as pre-existing debts. If this ground is sustained, the question just under consideration becomes mainly immaterial.

So far as this question is concerned, the provisions of the Revised Statutes on the subject of fraudulent conveyances are substantially the same as those of the second section of the act of 1796, "to prevent frauds, etc." Authorities, therefore, which would have been applicable to this question before the Revised Statutes are equally so now.

In *Lyne v. Bank of Kentucky*, 5 J. J. Marsh. 554, it is said:—

"It is the intent and purpose with which the grantor acts that characterizes the conveyance, and renders it fraudulent under the statute. Conveyances, when a man owes, are not prohibited; but conveyances with the 'intent or purpose to delay, hinder, or defraud creditors,' etc., are declared void, except so far as they may affect the grantor, his heirs, etc. Indebtedness to a large amount in proportion to the value of the grantor's estate might, no doubt, authorize the conclusion in many cases that his intent and purpose were fraudulent."

And in *Doyle v. Sleeper*, 1 Dana, 533, which was a writ of error to reverse a decree subjecting to the debts of Doyle certain lots, which by his procurement had been conveyed to his children, it was held that "the consideration of blood may be sufficient as against subsequent creditors, unless the conveyor was indebted at the date of the conveyance. But such indebtedness to a material extent would invalidate the deed as to all creditors. Such is the doctrine of legal or constructive

fraud established by a long series of adjudications upon the statute of 13 Elizabeth, which has been substantially incorporated into a statute of this state; and the same interpretation of the latter statute has been adopted by this court."

From the above and other authorities the principle may be deduced, that although James H. Lowry may not at the time have been insolvent, or so much involved at the date of the deed as to render the residue of his estate then necessarily insufficient to pay his debts, yet if he was involved "to a material extent," by which we are to understand an extent which might, in view of ordinary contingencies, endanger the rights of his creditors, then the deed was constructively fraudulent as to subsequent as well as pre-existing debts; for in such a case a fraudulent intent is implied; and the deed was void for express fraud, if from the extent of the grantor's indebtedness, compared with his means of paying, the unreasonableness of the conveyance as an advancement to the appellant, considering the claims of other children, and other attending circumstances, the inference is justified that the grantor made the conveyance for the purpose of avoiding the payment of his liabilities.

As to the amount of James H. Lowry's indebtedness on the 3d of March, 1859, there is some contrariety of evidence. But the conclusion is warranted, that of debts strictly his own, in which he was neither the surety nor partner of others, he owed not less than twenty thousand dollars, and probably much more. He was, moreover, largely involved as the security of various persons, whose circumstances justified the apprehension that much of this indebtedness would be devolved upon him. He was also liable for large amounts as the partner of Charles F. Lowry, in a mercantile establishment at Lexington, as was afterwards judicially determined.

The evidence conduces strongly to the conclusion that his entire indebtedness at the date of the deed was largely more than fifty thousand dollars, for a very considerable portion of which he was at that time pressed for payment with judgments and executions. He was at that time near sixty years of age. Having been twice married, he had one other child besides the appellant, who was grown and married, besides three or more children of his second marriage, some of whom were quite young. He appears to have advanced other property to J. K. Lowry, but none to either of his other children.

It can scarcely be supposed that he himself, in his embar-

rassed condition, merely intended by the conveyance to make to his son a reasonable advancement without detriment to his creditors, certain or contingent; but as he had no right to jeopardize the rights of his creditors and sureties by giving away his property, even to one of his children, thus hastening—at least rendering more certain—their involvement and loss by his failure, which soon after became manifest. Whether in making the deed he actually intended detriment and loss to his creditors or not, we are impelled to the conclusion, from all the facts and circumstances of the case, that it was a fraud upon their rights, and void, at least so far as it purports to convey his title, both as to his pre-existing and subsequent liabilities.

Whether the deed was also void as between Mrs. Jane B. Lowry and J. K. Lowry, or operated to vest in him such right of dower as she had in the land, it is not necessary now to decide; but as the judgment of the court below in effect directs a sale of said dower interest, which was not liable to the debts of J. H. Lowry if the deed had not been made, it is deemed erroneous in this particular, and will be reversed.

As to the claims of James H. Lowry against Fisher and Campbell for contribution for payments alleged to have been made as their co-surety, it is sufficient to observe, so far as Fisher is concerned, that the facts alleged for the purpose of fixing a liability on him are controverted and not sustained by any evidence; and as to Campbell, although his name is shown to have been upon a note with Charles F. Lowry and James H. Lowry to Elisha Warfield, on which J. H. Lowry appears to have paid about two thousand two hundred dollars, the conclusion is authorized by the evidence, both that the debt was one in which J. H. Lowry, as a partner of C. F. Lowry, was a principal obligor, and that the name of Campbell was procured to the note at his instance and as his surety.

Wherefore, perceiving no error in the judgment, so far as it adjusts and allows the claims of the appellees, and subjects the title of James H. Lowry to their satisfaction, the same is affirmed; but so far as said right of dower is embraced or affected by the order of sale, it is reversed and the cause remanded, with directions to enter a judgment in conformity to this opinion.

EFFECT OF RENEWAL OF NOTE: See *Galliot v. Planters' Bank*, 36 Am. Dec. 256, and note.

VOLUNTARY CONVEYANCE IS FRAUDULENT AS TO PRIOR AND SUBSEQUENT CREDITORS WHEN: See *Belford v. Crane*, 84 Am. Dec. 155, and note 163.

CECIL v. WALSH.

[2 BUSH, 168.]

ACTION ON PROMISE TO PAY "AS SOON AS ABLE" IS MAINTAINABLE without either plea of ability to pay or extraneous proof thereof. In such cases, a judgment and execution are the best test of ability to pay, and if they prove the inability of the promisor to pay, he is not prejudiced by the judgment.

ACTION upon a promise to pay "as soon as able." The opinion states the facts.

S. Turner, for the appellant.

Dunlap, for the appellees.

By Court, ROBERTSON, J. It seems to this court that the testimony authorized the jury to find that the appellant, within five years before the institution of this action, assumed to pay, as soon as able, the appellee's medical account as exhibited; and after the long lapse of time which intervened, the action was *prima facie* maintainable without either plea of inability or extraneous proof of it. Judgment and execution will be the best test of his ability to pay. If they prove his ability, he ought to pay; and if they fail, he cannot be prejudiced by the judgment, which is therefore affirmed.

ASHBROOK v. RYON. CRUTCHER v. RYON. MURPHY v. RYON.

[2 BUSH, 228.]

DELIVERY OF PROMISSORY NOTE GIVEN CAUSA MORTE WILL PASS the beneficial interest to the donee.

DELIVERY OF PASS-BOOK WILL NOT PASS MONEY IN BANK as a gift causa mortis.

SUIT in equity. The opinion states the facts.

A. H. Ward, for the appellants.

W. W. Trimble and A. J. James, for the appellees.

By Court, WILLIAMS, J. These cases were heard together in the court below, and are here on the same record. They involve the same questions, and the rights of the parties are connected; therefore we will consider them together, without reference to whether a formal order of consolidation was made.

Dennis Ryon died without issue, or even collateral kindred

in the United States, at the house of John Murphy, after severe and offensive sickness, in which Mrs. Murphy attended him with all the assiduity inspired by maternal affection. Being told by his physician that his illness would likely terminate fatally, after expressing some hope of recovery, he stated that if he recovered he intended that Mrs. Murphy should have a home, and if he died, he wanted her to have all his estate. That such was his desire, in view of his approaching dissolution, is well established.

Murphy and wife claim that but a few days before his death he delivered his pass-book, in which an entry was made of a deposit of something over five hundred dollars in the Cynthiana Bank, and that in said pass-book were the notes now in controversy, and that he then gave these notes and the deposit to Mrs. Murphy should he never recover. Dr. Williams states that on the same day Ryon told him he wanted Mrs. Murphy to have all his estate in case he died. She showed him the pass-book and several notes on different persons, and told him Ryon had given them to her for her kindness, and that she would not then be more than half paid.

Her minor son proves the gift and delivery. It is true that there is, as is usual, some difference in the statements of these various witnesses as to minor facts; but instead of this impairing the value of their evidence on the main facts, it goes to preclude the idea that the evidence was manufactured.

We regard it as sufficiently established that Dennis Ryon, in view of his approaching end, and as a reward to Mrs. Murphy for her kindness and devotion to him *in extremis*, did deliver to her or her husband for her use the pass-book and the notes, to be hers in case he died. What effect should be given to this delivery?

In *Turpin v. Thompson*, 2 Met. (Ky.) 420, this court held that the doctrine that a promissory note given *causa mortis* must either be payable to bearer or be assigned has been exploded, and that now the delivery of such note passes the beneficial interest to the donee; and we regard this as the rational doctrine more accordant to principle and modern authority.

E. H. Brants, after administration on Ryon's estate, withdrew the money from the bank, and sued the obligors on these notes, and Murphy and wife, asserting title to the money, and denying Mrs. Murphy's title thereto, some of whom had paid to her husband their notes and taken them up.

The court held the gift *causa mortis* incomplete, and rendered judgment against the obligors and Murphy and wife for these notes.

The money deposited in bank did not pass by the delivery of the pass-book, and the gift as to it was not perfect; but as to the notes the gift was complete, and passed the beneficial interest therein to Mrs. Murphy; and the obligors, so far as they have paid to her or her husband, should be protected, and she should be permitted to collect the remainder.

Dennis Ryon had published his written will some five years before his decease, but this can have no effect so far as Mrs. Murphy is concerned.

Wherefore the judgments are reversed, with directions to the court below for further proceedings in accordance to this opinion.

DELIVERY ESSENTIAL TO VALIDITY OF GIFT, when: See the note to *Harris v. Clark*, 51 Am. Dec. 362, and *Allen v. Cowan*, 80 Id. 316, and cases in note.

NEGOTIABLE INSTRUMENT GIVEN CAUSA MORTIS PASSES BY DELIVERY, when: See the note to *Harris v. Clark*, 51 Am. Dec. 362; *Overton v. Sawyer*, 75 Id. 444, and note.

BANK-BOOK GIVEN CAUSA MORTIS PASSES BY DELIVERY, when: See the note to *Harris v. Clark*, 51 Am. Dec. 363.

LEATHERS v. COMMERCIAL INSURANCE COMPANY.

[2 BUSH, 296.]

WAR WILL OPERATE TO RENDER VOID COMMERCIAL CONTRACTS entered into during its pendency between citizens of one of the belligerents with those of the other belligerent; will suspend the civil remedy upon existing contracts between similar parties, and will dissolve pre-existing contracts of continuing performance, such as those of partnership and insurance.

RULES CONCERNING EFFECT OF WAR UPON CONTRACTS BETWEEN BELLIGERENTS will apply as well to a civil war as to an international war, when the former has been authoritatively recognized by the domestic government, for in such case it becomes as to its legal incidents and consequences *quasi* international. But until so recognized, it is a mere insurrection, and will not affect commercial intercourse and transactions.

POWER TO DECLARE WAR IN UNITED STATES IS LEGISLATIVE, for the constitution delegates to Congress the exclusive "power to declare war." This power includes the power to recognize or declare insurrection as existing war.

CONTRACTS AND OTHER ACTS OF COMMERCIAL INTERCOURSE BETWEEN BELLIGERENTS were not made illegal by the Civil War in the United States until after the proclamation of the President of August 16, 1861, issued

under authority of the act of Congress of July 13, 1861, providing that the President might issue a proclamation interdicting all commercial intercourse between the citizens of the then and thereby recognized belligerent states.

ACTION to enforce against a vessel and her owners a promissory note given to secure the payment of certain insurance premiums. The opinion states the facts.

Stevenson and Myers, for the appellant.

Benton, for the appellee.

By Court, ROBERTSON, J. The appellant, Thomas P. Leathers, as part owner of the steamboat Vicksburg, running between the cities of Vicksburg and New Orleans, procured from the appellee, the Commercial Insurance Company of Cincinnati, Ohio, policy of insurance for insuring the boat for one year, commencing on the 12th of August, 1860; and for the premium of \$500 delivered to the company two negotiable notes, binding the boat and owners to pay \$250 on the 12th of February, 1861, and \$250 on the 12th of May, 1861. The first note was paid when due; but payment of the second note was refused on presentation at the place of payment in Orleans on the 16th of May, 1861; and to enforce the payment of this last note this suit was brought against the appellant Leathers, who by his answer sought to avoid the note, on the ground that the Civil War, commencing some time in 1861, and, as he erroneously assumed, about the 12th of February, 1861, made it illegal and void. The circuit court sustained a demurrer to that defense, and, no other being offered, rendered judgment for the appellee for the principal and interest of the note; and on this appeal from that judgment the only question for our revision is, whether there was any failure of consideration as charged.

According to obvious policy and established principle, all the citizens of the conflicting belligerents in an international war are considered enemies; and, as a logical and legal sequence, all commercial contracts made between citizens of one belligerent with those of the other belligerent during the pendency of the war are adjudged void; civil remedy on all such contracts made before the war is suspended, and all pre-existing contracts of continuing performance, as those of partnership and insurance, are dissolved by intervening war; and the same policy and principle equally apply to a civil war which, when authoritatively recognized by the domestic government, be-

comes, as to its legal incidents and consequences, *quasi* international.

Such a civil war raged in the United States from some time in the year 1861 to some time in the year 1865, but certainly had not been waged before February, 1861, when the first note for the premium became due and was paid. The subsequent war could not retroact so as to affect that installment. If, in the true sense, the war existed before the expiration of the policy on the 12th of August, 1861, the underwriter would not have been responsible for any loss occurring between that date and the commencement of the war; and to that extent the consideration of the note sued on would have failed, and the appellant's answer would present a good defense *pro tanto*.

Insurrection is not, in the legal sense, war; and the late strife, however long, terrible, and desolating, was not war of such a character as to make commercial intercourse and contracts between the antagonist citizens illegal before its recognition as such by the government of the United States.

In England, and most other royal governments, the power to declare or to recognize war is executive; but here it is legislative, because the organic law of the United States delegates to Congress the exclusive "power to declare war," and of course to recognize or declare insurrection as existing war.

In cases of invasion or insurrection, the federal constitution gives to the President power to raise forces to repel the invasion or suppress the insurrection; but the occasional employment of force for such a special purpose is neither a declaration nor a recognition of war. As a constitutional means for the suppression of our late Rebellion, the President had a right to prevent or to destroy supplies to the insurgents; and for this purpose he had constitutional power to blockade the maritime ports in the insurrectional states; and consequently, his act never having been repudiated, but impliedly recognized by Congress, his proclamation of blockade, taking effect about the second day of May, 1861, was lawful, and justified the capture of vessels violating its interdict, as adjudged in the *Prize Cases*, 2 Black, 635.

But that proclamation did not attempt to affect interior intercourse and commerce between the people of the conflicting states, and cannot be understood as having had any such legal effect; and so Congress seemed to think when, by the act of the 13th of July, 1861, it authorized the President to issue a proclamation interdicting all commercial intercourse between

the citizens of the then and thereby recognized belligerent states. This enactment was impliedly an authoritative recognition of the fact that insurrection had culminated into war. Before that time the national government had not acknowledged that secession had become belligerence, with all belligerent rights and obligations resulting according to the laws of technical war; and this statute necessarily implied also that Congress did not consider previous intercourse between all the states as illegal, and consequently did not recognize such a previously subsisting war as *per se* made commercial intercourse contraband, and contracts void.

And history, verified by the presentment of this note for payment in Orleans, after the 2d of May, 1861, shows that after the blockade there was some commercial intercourse between the contesting states which has never been adjudged unlawful, and will, we presume, never be so decided; but before contracts shall be nullified by war, both reason and justice require that the contracting parties should have cause to know when they contracted that they violated the laws of an existing war. And to give notice of the congressional recognition of such a state of war was the sole object of requiring the President to proclaim the fact of recognition by the act of the 13th of July, 1861. That proclamation was made on the 16th of August, 1861; and before that time, contracts and other acts of commercial intercourse were not made illegal by the war.

Consequently, as the policy of insurance in this case expired by its own terms on the 15th of August, 1861, it was not affected by the war, and there was no failure of the consideration of the note for the last installment of the premium.

Wherefore the judgment of the circuit court is affirmed.

EFFECT OF WAR UPON COMMERCIAL CONTRACTS: See *Hyatt v. James*, *post*, p. 505.

RIGHTS OF BELLIGERENTS IN CASE OF CIVIL WAR: See *Bell v. Louisville & N. R. R. Co.*, 89 Am. Dec. 632, and note.

JENNINGS v. CRIDER.

[2 BUSH, 322.]

AGREEMENT BY VENDOR OF REAL PROPERTY THAT, AS PART OF CONSIDERATION of the conveyance, he will take up and pay a note which his vendor owes on the same property, is not a contract to "answer for the debt, default, or misdoing" of the vendor, so as to be void under the statute of frauds because it is not in writing; but is a new contract for a valid consideration which is valid by parol and binding upon the parties.

WITNESS IS NOT INCOMPETENT BECAUSE HE HAS SIMILAR CAUSE OF ACTION against the same parties, if he is not directly interested in the issue under trial, and is not a party to the action in which he is called to testify.

BILL in equity. The opinion states the facts.

W. S. Pryor, for the appellant.

S. E. De Haven and John M. Harlan, for the appellees.

By Court, **HARDIN, J.** About the 1st of November, 1864, A. Murdock and William Jennings sold to G. I. Todd a lot of ground with a steam-mill thereon, situate on the Ohio River, near the town of Westport, in Oldham County, at the price of \$2,700, payable as follows: \$250 cash, and for \$2,000 Todd assumed and agreed to pay two notes to Jones, of \$1,000 each, given by Murdock and Jennings for the property, and secured by a lien upon it; and for the residue of \$500, Todd gave a note to William Jennings, payable in bank at four months from its date, and executed by himself as principal, and James Garrett, W. A. Crider, and Thomas W. Jennings, as his sureties. Murdock and William Jennings executed a deed to Todd which was not recorded, and afterwards Todd sold the property to the appellant, Thomas W. Jennings, in consideration of his undertaking to assume and pay the two notes of \$1,000 each, given to Jones, for which the property was in lien; and also the note of \$500 given as aforesaid to William Jennings; and Todd delivered over to the appellant, Jennings, the unrecorded deed, with other papers relative to the title, and gave him an order to Murdock and William Jennings to make another deed conveying the property to him, and in pursuance of this arrangement Murdock and William Jennings and wife, on the second day of June, 1865, executed a deed for the property to T. W. Jennings, reciting the consideration in the deed to be \$750 cash in hand paid, and the assumption of the payment of said two notes of \$1,000 each.

T. W. Jennings having failed to pay the debt of \$500, Crider, as one of the sureties of Todd, was compelled to pay \$166 thereof, to recover which he brought this action against Jennings. It is alleged in the petition that the plaintiff and his co-sureties of Todd were entitled to have themselves substituted for the payee of the note, and thus have enforced a lien on the mill property for their relief, and that they relinquished that right and consented to the sale to the defendant, upon his undertaking to exonerate them by paying the debt as aforesaid.

The answer of the defendant denies the material averments of the petition, and alleges that the defendant purchased the property from Murdock and Jennings, as their deed purports to show, and also relies on the statute of frauds to exempt the defendant from liability on the alleged agreement to pay the debt of Todd and his sureties of five hundred dollars, the agreement, if made at all, being in parol.

The court, on hearing the cause, rendered a judgment for the plaintiff, from which Jennings has appealed to this court.

The depositions of Garrett and Todd were taken by the plaintiff, and excepted to by the defendant, and one question is as to their competency. It is insisted for the appellant that Garrett was not a competent witness for Crider, because, if the latter was entitled to recover on the alleged agreement the amount claimed, Garrett also might recover on it a like sum paid by him as one of the sureties of Todd. But whatever effect this might have on the credit of the witness, it does not bring him within the class of persons enumerated by section 670 of the civil code as incompetent to testify. Garrett was not a party to the issue, and the judgment of the court upon it could not be used as evidence, either for or against him; he was not, therefore, legally interested in the result of the cause. Todd might have been interested in the success of Crider, because the satisfaction of Crider's claim by Jennings would relieve him of liability to Crider; but he appears to have been released from that liability, and was therefore a competent witness when he gave his deposition.

The evidence, we think, sufficiently establishes the alleged parol undertaking of the appellant to discharge the debt of five hundred dollars, and thus relieve both Todd and his sureties of it, as part of the consideration of the mill property; and this was not in our opinion a mere collateral undertaking to "answer for the debt, default, or misdoing" of Todd, but

was a new contract on a distinct and amply sufficient consideration for the non-performance of which the appellee, who was a party to it and to be benefited by it, had a right to maintain his action against the appellant.

This conclusion seems to conform to the opinion of this court in *Creel v. Bell*, 2 J. J. Marsh. 309, where it was held that the Independent Bank of Columbia, being indebted to Bell & Co. as depositors, and Creel, who was indebted to the bank, having obtained the consent of Bell & Co. to the use of their means by the bank on his promise to pay his own debt into the bank to reimburse Bell & Co., the agreement of Creel was not within the statute of frauds, and Bell & Co. could recover thereon against him.

It seems to us, therefore, that, whether the appellee was entitled to be relieved by subrogation to the rights and lien of the original vendors of the property, or whether such right was or not waived or merged in the contract of the appellant, the judgment as rendered was not erroneous.

Wherefore the judgment is affirmed.

WITNESSES ARE DISQUALIFIED BY INTEREST, WHEN: See *Hatch v. Bartle*, 84 Am. Dec. 484; *Corgan v. Frew*, 89 Id. 286, note.

ANDERSON v. WHITLOCK.

[2 BUSH, 308.]

PARTNERS ARE ENTITLED TO SHARE IN PROFITS REALIZED FROM ADVENTURE of one member of firm, in investing a large sum of confederate currency belonging to the firm, but supposed to be worthless, in the purchase and shipping of cotton.

BILL in equity. The opinion states the facts.

H. A. Phelps, for the appellant.

John W. McPherson, for the appellees.

By Court, PETERS, C. J. Appellant's intestate and appellees, having purchased the Eclipse mills, in Christian County, in March, 1860, entered into articles of copartnership for running and operating said mills for the term of three years, under the style and firm name of Anderson, Whitlock, & Co.

The partners advanced an equal portion of the capital invested in the enterprise, and were to share equally the profits and losses; and stipulated that during the continuance of the

partnership, amongst other things, they would exert themselves for their joint interest, profit, and advantage; that just and true books should be kept, wherein each partner was to enter as well all money by him received, paid, laid out, and expended about their business, as also everything sold or bought on account of the business of said firm, and the books to be so kept that the partners should at all times have access thereto without interruption or hindrance; and that each partner, at the close of each and every year, or oftener if necessary, should render to the others a true and just account of all profits by him and them made, and of all losses sustained, and of all other things by them and each of them acted and done in the business of their partnership. For a period of eighteen months, perhaps, after they had embarked in the enterprise, it was harmoniously and skillfully conducted, and great gains were realized by the partners; but then that portion of the state was invaded by confederate forces, and was held by them until the fall of 1862, during which time they appropriated the products of the Eclipse mills, and paid for them in Tennessee bank notes or confederate money, or both. After the country was abandoned by said confederate army, this money was not current, and of little value; it was, however, disposed of by appellant's intestate, and this litigation has arisen from his failure to account satisfactorily to his partners for the proceeds.

It is alleged in the petition that when the confederate army abandoned Christian County, the firm had on hand about eight thousand dollars of confederate and Tennessee money, which was not current, and was then of little value, and it became a question with the partners what was best to be done with it to make it available; that the intestate was the financial agent of the firm, and he, in their consultations, proposed to go South to invest the money, to which the other partners assented; and knowing his skill as a financier, gave him plenary power to invest it according to his own judgment. That in accordance with said agreement, said Anderson did go to Memphis and other places in the South, and invested said eight thousand dollars or more in cotton, at a price not exceeding eight cents per pound, in the funds of the firm, which was very low; and he shipped the cotton thus purchased to St. Louis and other points, where he sold it for very high prices, ranging from sixty to seventy cents per pound, all of which he collected and illegally and fraudulently held,

and converted the whole of the proceeds to his own use, and failed and refused to account to his partners for any part thereof. It is also alleged that Anderson discounted said eight thousand dollars at a very heavy rate, then charged himself on the books of the firm with the amount, after taking off the discount, without the consent of his partners took the whole speculation to himself, and charged his expenses of the trip to the firm. Anderson having died after his return from the South intestate, this action was brought by appellees against appellant as his administrator for a settlement of the partnership, and especially for a settlement of the cotton speculation in the South, in which, as is alleged, he made a profit of sixty thousand dollars; and for their respective shares of said sum they pray judgment and for general relief. The articles of copartnership are made part of the petition.

In an amended petition it is alleged that Anderson acted as the agent of said firm in selling flour, meal, and the products of their said mills, and when appellees learned he was selling for confederate and Tennessee money, they protested against such sales; but he persisted in making sales for said money, saying it would be as good as gold, and he would see that the firm would sustain no loss on that account, and upon these terms they consented for him to continue to sell. That Anderson agreed to go South, and did go, for the express purpose of investing said funds in land or cotton, which could and might be converted into current funds for the benefit of said firm; and while in the South, with said funds purchased, as they charge he admitted to them, one hundred thousand pounds of cotton, all of which he caused to be sold at the sum of seventy thousand dollars, and for two thirds of that sum they pray judgment. They make the books kept by Anderson parts of their petition, to the entries on which, as made by Anderson, they objected and refused to sanction, especially those on page 123. That after he returned from the South, he concealed from them for a considerable length of time the fact that he had purchased cotton, but charged himself on said books with \$3,791.46. This conduct they allege they refused to sanction, and to continue longer the partnership with him, and he then sold his interest to another partner. They charge that the books of the firm, as kept by said Anderson, are false and fraudulent, made so by him to defraud them; and that he is indebted to them as his partners in the sum of eight hundred dollars over and above the cotton speculation. They

pray for a full settlement of the partnership accounts, and for the proper judgment.

It is admitted in the answer that the persons named formed a partnership for the purposes and on the terms stated in the petition, and that Anderson was the financial partner of the firm, who, as is alleged in the answer, kept a book showing the amount of funds received and disbursed by him for said firm. It is, however, denied that he had on hand at the time designated in the petition \$8,000; but the amount is stated to be \$6,896 in confederate money, which Anderson took South for the purpose of converting into Tennessee paper or other currency, and not to invest in cotton or any other article, and that he exchanged the same for Tennessee money or other currency at a discount of thirty per cent, and that he kept a book in which he charged himself with all the money he received for said firm and credited himself by the sums paid out, which book was subject to the inspection of the other members of the firm, and was delivered to the partner John C. Whitlock. That seventy cents on the dollar was all he realized for said confederate money, which was the best at the time that could have been done with it; but that he did not invest the partnership funds in cotton, as he, appellant, is informed. He alleges that it will appear from an inspection of the books that there is an error on them to the prejudice of Anderson, and when corrected there will be a balance in his favor of \$——; and the indebtedness by Anderson to the firm in any sum whatever is denied.

It appears that Anderson sold his interest in the mill property, with the consent of the other partners, to one John Whitlock; but that sale did not affect the rights of the parties growing out of the alleged cotton speculations, or to a settlement with Anderson of the firm accounts and business transactions prior to the sale.

The material allegations of the amended petition are controverted by the answer thereto, and in said answer it is stated that Anderson, upon his return from the South, informed his partners that he was unable to exchange the confederate money for current funds, and in consequence thereof he had invested them in cotton, a part of which had been burned, and told them they could have an interest in the cotton, or he would take the confederate money at thirty per cent discount, and they refused to have anything to do with the cotton.

The accounts were referred to the master, who reports that the proof taken is meager and unsatisfactory, but that he had made up the accounts "on several hypotheses, each of which he submits to the court." Exceptions were taken to the report by appellees; and on final hearing, without formally disposing of the exceptions, the court below rendered judgment in favor of the plaintiffs in that court for \$1,141.91, with interest from the date of the judgment until paid, and costs, to be levied of assets, etc. From that judgment Anderson's personal representative has appealed, and the surviving partners prosecute a cross-appeal.

It is contended by appellant's counsel, that even if Anderson had contracted with his partners to go South to exchange the confederate money or invest it in cotton, such contract would be illegal, and no action could be maintained upon it. This question we regard as settled by this court in the opinion of the 31st of May, 1867, in the case of *Martin v. Horton*, 1 Bush, 629, where the authorities on the question are reviewed at length, and the court held that "the circulation of confederate currency within the military lines and jurisdiction of the United States was forbidden by its laws and public policy, hence illegal. The circulation of United States treasury notes within the military lines and jurisdiction of the Confederate States was likewise prohibited by their laws and public policy. The laws and policy of each were to foster and encourage the circulation of their own currency, and to discourage and prohibit the circulation of the currency of their adversary; therefore, the non-combatant citizen must regulate his conduct by the power which might predominate over him for the time being."

As then the county of Christian was, when the confederate money was received by the firm for their articles, within the military lines of the confederate government and within their jurisdiction, and the reception of it for their articles a necessity, perhaps, the investment of it in the South in cotton or other products by one of the partners would constitute a sufficient consideration to make him responsible for the proceeds, especially as he voluntarily undertook the mission, and, as is not improbable, was not opposed to furnishing the products of their mills to the confederate army for the money received. Under such circumstances, to deny a remedy to the injured partners would not only be permitting the party to profit by his own wrong, but would be aiding him in the perpetration

of a fraud. This ground cannot, therefore, be available for a reversal. The case of *Laughlin v. Dean*, 1 Duvall, 20, is not analogous to this case. Wherefore, as no errors are perceived in the judgment prejudicial to appellant, the same cannot be reversed on the original appeal; but upon the cross-appeal we are constrained to a different conclusion.

By the terms of the partnership agreement, independent of the general law on the subject, each one of the partners expressly and directly stipulated to exert himself during the continuance of the partnership for their mutual interest, profit, and advantage, and to keep just and true books, wherein all the actings and doings of each partner should be entered, and the same to be at all times open to the inspection of all the members of the firm.

There is no evidence adduced that Whitlock and Johnson had contracted with Anderson to sell the confederate money on hand to him. The term for which they had formed the partnership had not terminated, and we must assume that Anderson went South for the benefit of himself and partners. If, therefore, he made investments of partnership effects which resulted profitably, his partners were entitled to share the profits; as, upon the other hand, if his investments had been unfortunate or disastrous, they would have been bound to have shared the losses.

From the evidence in this case, it seems that large profits were realized by the adventure, and that the shares of each of the partners in said profits were greater than the amount for which the judgment was rendered in their favor, and that the basis for a final settlement is simple, and is furnished by the proof already taken.

The quantity of cotton sold on account of the intestate, at St. Louis and New York, with the price for which it was sold, is shown by the evidence now in the case; and the price at which it was purchased is also shown,—say eight cents per pound,—to which are to be added the cost of getting the cotton to market, which seems to be about fifty dollars per bale; and the commissions for selling will form an additional charge.

The accounts should be made up by charging appellant's intestate with the amounts of sales in St. Louis and New York, and crediting him by the costs, including his expenses, the original cost of the cotton, of taking it to market, and commissions for selling. And if appellant can show by the proof that any of the cotton sold on his account in said markets

was purchased with the means of other parties, and not with the firm effects, he should be credited by the amount thus purchased.

This can work no hardship on appellant's intestate, because he expressly covenanted to keep a fair book of entries, showing all his actings and doings relating to the partnership; and if a loss should result from a failure on his part to discharge this duty, it will fall on the delinquent party, where it should fall. Appellant should be credited by any other sums that he may hereafter show himself entitled to.

Wherefore the judgment is reversed on the cross-appeal, and the cause is remanded, with directions that it be again referred to the master for the ascertainment of facts as herein suggested, and for further proceedings consistent with this opinion.

THE PRINCIPAL CASE IS CITED to the point that the circulation of confederate currency within the confederate military lines during the war was not illegal, so as to affect the validity of contracts: *Hyatt v. James*, *post*, p. 505.

MILLER v. ANTLE.

[2 BUSH, 407.]

PURCHASER OF LAND AT COMMISSIONER'S SALE HOLDS TITLE IN TRUST, where he has agreed with the owner, prior to the sale, that he will buy the land, and that if the owner will within a specified time pay his proportion of the price, he may retain a specified quantity of the land; and the purchaser as such trustee is bound to convey to the original owner upon payment as agreed in pursuance of the agreement.

REQUIREMENT OF STATUTE OF FRAUDS OF WRITTEN MEMORIAL OF CONTRACT FOR SALE OF LAND is satisfied by a receipt for money "for land" shown to be the land in contest, strengthened by the admissions of the personal representatives of the party to be charged as to his liability and duty.

SUIT in equity to enforce conveyance of certain lands. The opinion states the facts.

Barret and Roberts, for the appellants.

James S. Pirtle, for the appellee.

By Court, ROBERTSON, J. Under a decretal sale Miller bought, for about half of its value, Antle's land of 217½ acres, in fulfillment of a promise to keep 100 acres at the price bid, and to concede to Antle the residual 117½ acres on his payment, within three years, of the proportionate consideration.

the last installment of which was payable by Miller at the end of three years. With Miller's presumed knowledge, and through his probable instrumentality, this understanding was published before the bidding and prevented competition.

Another and only other creditor of Antle, for about eleven hundred dollars, offering more than the price at which Miller had thus bought, was about to open the biddings for his own benefit and that of Antle, which Miller prevented by paying that debt and adding the amount of it to the consideration, and thus increasing the *pro rata* to be contributed by Antle for his 117½ acres. Miller occupied his 100 acres, and Antle resided on and used his 117½ acres. Miller died before the expiration of the credit, and had, during his life, received of Antle about fourteen hundred dollars, and had given receipts for so much "paid for land."

The commissioner of sale having conveyed the legal title to Miller, Antle, a few days before the last installment was demandable, filed a petition in equity, offering full payment of his conventional share of the consideration, and seeking a conveyance from Miller's heirs of the 117½ acres of land. The answer of the administrators, admitting the foregoing facts, with the qualification only of their own allegation that Antle agreed to pay his portion at different times, as the installments became due, and had failed to do so, pleaded the statute of frauds and perjury. The answer of the infant heirs expresses ignorance, and admits nothing.

The chancellor having granted the relief sought by the petition, the appellants insist that the alleged contract was a "sale" of land by Miller to Antle, which cannot be enforced, as there was no written memorial of it.

The facts, as alleged and admitted, do not constitute a sale by Antle to Miller, or by Miller to Antle, of Antle's land; but altogether, when stamped by Miller's prevention of a sale for a higher price, they constitute an implied trust, to which the statute does not apply, and could not be applied without perversion to the encouragement of fraud, instead of the true design of preventing fraud.

But if the statute apply to this case, the receipts for money "for land," shown to be the land in contest, fortified by the admissions by the personal representatives of the knowledge and personal duties of Miller, constitute a sufficient written memorial of all that the statute requires to be in writing; and even as to the heirs, supplies all that their infancy, and

consequent ignorance of, the material facts, prevented them from expressly admitting concurrently with the administrators.

Wherefore the judgment of the chancellor is affirmed.

MEMORANDUM, REQUIRED BY STATUTE OF FRAUDS ON SALE OF LANDS is sufficient when: See *Farrell v. Mather*, 87 Am. Dec. 64], and note.

HEDGES v. WALLACE.

[2 BUSH, 442.]

CONTRACT OF SALE IS NOT RENDERED INVALID MERELY BECAUSE SELLER HAD KNOWLEDGE OF ILLEGAL PURPOSE to which the articles sold were to be put, and the purchaser will be liable for the contract price unless he can show that the seller participated in the intent to commit, or had some interest in, the illegal act. So held where a citizen of the United States, after war had been declared, sold to another a lot of hogs, with knowledge that the latter bought them for the use of the confederate army.

COMMON REPUTATION IS NOT ADMISSIBLE TO SHOW THAT SELLER OF GOODS, which were bought for illegal purpose, knew the purpose to which they were to be put, nor to show his intention to participate in the wrongful act.

ACTION upon contract of sale to recover the purchase price. The opinion states the facts.

Huston and Hughes, and Crockett and Yeaman, for the appellant.

I. A. Spalding, for the appellee.

By Court, PETERS, G. J. This action was brought by appellant against appellees to enforce the collection of \$295.60, the price of twenty-eight hogs, weighing gross 7,390 pounds, which he alleges he sold and delivered to appellees in the fall of 1861.

In an amended answer, appellees state that they were agents and subcontractors under one E. G. Seabee, who was a contractor with the Confederate States government to furnish it with hogs, beef-cattle, and other supplies for the army, whilst said confederate government was prosecuting a war against the government of the United States; that appellees, Wallace and Nesbitt, informed appellant that they were purchasing hogs to supply the said confederate army, and when they purchased his hogs and weighed them, he well knew they were purchased for that purpose.

A verdict and judgment having been rendered against ap-
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pellant in the court below, he has brought the case to this court by appeal.

Two propositions of law are involved in this appeal which will be considered.

1. Is the mere sale of goods, knowing that the buyer will make an illegal use of them, sufficient of itself to deprive the vendor of the right to recover the price?

2. If the knowledge of the illegal design shall have that effect, is it competent to prove that the general reputation in the neighborhood of the vendor was that the purchasers were buying for such illegal purpose competent evidence to fix the guilty knowledge on the vendor?

As to the first proposition, it is said, in Story's Conflict of Laws, sec. 253, after referring to many cases which had undergone judicial investigation, that the result of these decisions certainly is, that the mere knowledge of the illegal purpose for which goods are purchased will not affect the validity of the contract of sale; but there must be some participation or interest of the seller in the act itself, but doubts whether the doctrine is reconcilable with the sound principles of morality of the common law; and quotes with approbation the illustrative case put by Chief Justice Eyre, of the man who sold arsenic to one who he knew intended to poison his wife with it. He would not be allowed to maintain an action upon his contract. A contract is not void merely because it tends to promote illegal or immoral purposes: Hilliard on Sales, 376; *Armstrong v. Toler*, 11 Wheat. 258.

A contract for the sale of a house and lot is not vitiated by the fact that the vendor knows, at the time of making it, that the vendee intends it for an immoral or illegal purpose: *Armfield v. Tate*, 7 Ired. 259. A sale of goods is not void, although the seller knows that they are wanted for an illegal purpose, unless he has taken part in the illegal purpose: *Hodgson v. Temple*, 5 Taunt. 181. In that case Chief Justice Mansfield said: "The merely selling goods, knowing that the buyer will make an illegal use of them, is not sufficient to deprive the vendor of his just right of payment." In *Dater v. Earl*, 3 Gray, 482, the court said: "If the illegal use to be made of the goods enters into the contract, and forms the motive and inducement in the mind of the vendor or lender to the sale or loan, then he cannot recover, provided the goods or money are actually used to carry out the contemplated design. But bare knowledge on the part of the vendor that the vendee intends to put

the goods or money to an illegal use will not vitiate the sale or loan, and deprive the vendor of all remedy for the purchase-money."

Where goods are bought from an enemy, even in his own territory, by a citizen of the United States, the sale is valid, and the price may be recovered, although the act might be a misdemeanor and the property liable as a prize: *Coolidge v. Inglee*, 13 Mass. 26.

It will be seen, therefore, that a contract is not void because there is something immoral or illegal in its surroundings or connections, and yet it is equally certain that a contract is void when it is illegal or immoral. It has been held that where goods were sold to a man who intended to smuggle them and defraud the revenue, and the vendor knew his design, the contract was valid, and the vendor could recover the price.

But where goods were sold to one who intended to smuggle them to defraud the revenue, and the vendor not only knew the intention, but put them up in a particular manner so as to enable the purchaser to carry out his purpose, the contract was held void, and the price could not be recovered.

All these authorities show that it must be a part of the arrangement, and the vendor must participate in the intent to accomplish the illegal act: *Phillips v. Hooker*, Phil. Eq. 193.

And this court, in *Steele v. Curle*, 4 Dana, 381, strongly argues to the same effect, although the point was not directly before the court.

Common reputation in the neighborhood of what the intention of Wallace and his employer was in purchasing the hogs was not competent even to fix a knowledge of the fact on appellant: *Farmer v. Lewis*, 1 Bush, 66.

It results that the instructions asked by appellant consistent with the views expressed in this opinion should have been given, and those asked by appellees which conflict with these views were erroneous. And evidence of the common reputation of the purpose of Wallace and others in purchasing the hogs should have been rejected.

Wherefore the judgment is reversed and the cause remanded, with directions to award a new trial, and for further proceedings consistent herewith.

KNOWLEDGE OF SELLER THAT GOODS ARE TO BE USED FOR ILLEGAL PURPOSE will avoid sale when: See *Gaylor v. Soragen*, 76 Am. Dec. 154. See also cases cited on this point in the note to *Tracy v. Talmage*, 67 Id. 153.

TERRILL v. RANKIN.

[2 BUSH, 453.]

ORDER OF SUPERIOR OFFICER IS NO DEFENSE TO ACT OF SOLDIER, unless the act was one authorized by the laws of war, and which the superior officer had power to command.

LAWS OF WAR DO NOT JUSTIFY BREAKING INTO BANK AND SEIZING MONEY OF NON-COMBATANT CITIZENS, and an officer who does such an act, though in pursuance of the order of his commanding general, is personally liable for the consequences of his act.

CONFEDERATE GOVERNMENT AND ITS OFFICERS ARE ESTOPPED FROM CALLING PEACEABLE CITIZENS of Kentucky enemies, or treating their property as that of enemies, by the fact that that government claimed political sovereignty over the state, provided a government for her, and gave her full representation in its Congress.

FEDERAL ACT OF 1862, AUTHORIZING TAKING OF ALL SORTS OF PROPERTY in the revolting states, might have authorized a retaliatory enactment by the confederate government. But in the absence of such enactment, the officers of the confederate government were not authorized to order the taking by force of private property of non-combatant citizens, in violation of the laws of war.

KENTUCKY AMNESTY ACT OF FEBRUARY 23, 1867, IS UNCONSTITUTIONAL in so far as it affects or was intended to affect civil remedies for private wrongs:

ACTION for damages for conversion. The opinion states the facts.

Charles Eaves and J. F. Bullitt, for the appellant.

L. W. Powell, J. H. Powell, and J. W. Trafton, for the appellee.

By Court, **ROBERTSON, J.** In December, 1864, during the prevalence of the late Civil War, and while General Lyon of the confederate army was in the military occupation of the town of Hopkinsville, Kentucky, he issued the following order, dated Hopkinsville, Kentucky, December, 1864:—

“**Lient. J. E. Rankin, Acting Chief Quartermaster, Department Western Kentucky**, will at once proceed to the bank in this place, open the vaults, safes, etc., and take possession of all money of every description found therein. He will retain possession of same until further orders.

“**By order of Brigadier-General Lyon.**

“**W. D. McKAY, Capt. and A. A. A.”**

In executing that order, Rankin, the appellee in this case, forcibly abstracted, with other moneys, \$5,411 specially deposited therein by the appellant.

For that act, charged as wrongful, the appellant, on the 25th of August, 1865, brought this action, which the appellee answered by pleading the said order, alleging that the appellant was, as a citizen and resident of Kentucky, an enemy of the Confederacy, then recognised as a belligerent, and that "he, appellee, disposed of the money as ordered to do by General Lyon, his superior officer, not appropriating one cent of said money to his own use."

The circuit court overruled a demurrer to that answer, and thereupon dismissed the action.

That judgment this court cannot affirm.

As adjudged in *Mitchell v. Harmony*, 13 How. 115, and in *Christian County v. Rankin*, 2 Duvall, 502 [87 Am. Dec. 505], unless the order was authorized by the laws of war, it conferred on the appellee no legal authority, and consequently his act was illegal, and he is personally responsible in this action for all the consequences of his own unjustifiable and tortious act.

If the act, as charged and admitted, should be acknowledged to have been colorably belligerent, the answer fails to show that it was a legal exercise of belligerent right; and for this conclusion, we will suggest three reasons:—

1. To justify as lawful the exercise of belligerent right, General Lyon must have ordered the act complained of for the use of his *de facto* government, and appropriated the money to its use. But admitting, as the demurrer did, all the facts stated in the answer, nevertheless it may be true, and from the guarded manner in which the disposition of the money is vaguely asserted may be not improbable, that the money, as in many similar cases, was taken and appropriated to private use, which would make the spoliation robbery, without any semblance of either legal or moral excuse. On this ground alone, therefore, had there been no other, the demurrer to the answer ought to have been sustained.

2. But even if the money were taken and used for the Confederacy, we cannot admit that any belligerent right justified such an act.

The wisdom and magnanimity of this wonderfully progressive era have made no greater progress than in the usages of war; and now, in this Christian age of civilization and amelioration, we presume that no civilized nation would sanction, as a rightful exercise of belligerent power, rifling a bank and seizing the private money of non-combatant citizens. We

neither know nor have heard of any such sustained example among such nations for many years.

The example of the Russian general Diebitsch, when he crossed the Balkin and entered Romelia with his invading army, and of the American generals Taylor and Scott, in their invasion of Mexico, should be recognized as illustrations of the true law of international warfare; and we know no subsequent authority or precedent against it in any international war between Christian nations. General Diebitsch assured Mussulmans, and generals Taylor and Scott assured Mexicans, of exemption from spoliation of their private property; and these pledges were fulfilled.

The right to impress property for necessary and immediate military use, or levy contributions of articles of subsistence, is still admitted to be a belligerent right; but the exercise of that right is subject to conservative limitations; and the act done in this case does not come within the reason or the range of that right as yet practiced or recognized by civilized nations. In our late Civil War, sectional and personal passions too much ruled the antagonist parties, and as in all such strifes, prompted many illegal acts of rapacity and proscription on both sides. But vindictive passion cannot ever excuse, nor the plea of retaliation always justify, a violation of the law of international war, which is the law of civil war also.

In Lawrence's *Wheaton*, p. 596, the author says: "Private property on land is also exempt from confiscation, with the exception of such as may become booty in special cases, when taken from enemies in the field or in besieged towns, and of military contributions levied upon the inhabitants of the hostile territory."

"The general rule derived from national law is, that no use of force against an enemy is lawful unless it is necessary to accomplish the purposes of war. The custom of civilized nations founded upon this principle has, therefore, exempted the persons of the sovereign and his family, the members of the civil government, women and children, cultivators of the earth, artisans, laborers, merchants, men of science and letters, and generally all other public or private individuals in the ordinary civil pursuits of life, from the direct effect of military operations, unless actually taken in arms, or guilty of some misconduct in violation of the usages of war by which they lose their immunity."

The immunity of property as well as of person is here evidently intended.

Halleck, also, in his *International Law*, p. 456, says: "Private property on land is now, as a general rule of war, exempt from seizure or confiscation."

This rule has been asserted by our own government, and the recognition of it claimed of European governments for half a century. And the modern course of these nations implies its general recognition. It was so adjudged by the court of king's bench in England, in the case of *Wolf v. Oxholm*, 6 Maule & S. 92, in which the court adjudged that the confiscation of British debts by Denmark was void as unauthorized by the modern law of nations. The same principle was recognized by the supreme court of the United States in *Brown v. United States*, 8 Cranch, 110; and by this court in *Norris v. Doniphan*, 4 Met. (Ky.) 391. And if it be illegal to take uncertain representatives of money, the unlawfulness of taking money itself is still more flagrant.

While, therefore, the emergencies of war may justify the taking of such property as horses for military use, subject to the obligation to pay the value, we can see neither reason nor authority justifying the seizure of money, by a forced loan or otherwise, than for enforcing a general contribution levied according to the usages of war.

As the conflicting parties had equal belligerent rights, the federal enactment of 1862, authorizing the taking of all sorts of property in the revolting states might perhaps have authorized a retaliatory act by the confederate government. But no such act has been pleaded, or is judicially known by this court. And without some such authority, General Lyon had no right to order the assault on the bank, and the seizure of the appellant's money, in violation of the international laws of war.

3. But the confederate government and its army of officers and soldiers are estopped from asserting or exercising any belligerent act against the property of such peaceable citizens of Kentucky as the appellant is admitted to have been when his money was taken. The Confederacy had assumed that Kentucky was one of her sisterhood, had organized a provisional government for her, claimed political sovereignty over her, had elected a governor for her, and drew from her bosom as a confederate state a full representation in her Congress. And this representative mockery and pseudo-sovereignty were

never abandoned until the close of the war. And consequently, as said by this court in the case of *Baker v. Wright*, 1 Bush, 500, the confederate authorities thus claiming the appellant and all others like him in Kentucky as confederate citizens and friends, engaged to protect them and guard their property, and precluded themselves from calling them enemies or treating their property as enemies' property.

This estoppel prevents the appellee from pleading that he took the property of an enemy, and had the belligerent right to do so.

Nevertheless, Kentucky continued a state in the Union, in fact and in law, and as such state was faithful and true to the last; and *de jure*, the appellant was her citizen, entitled to the protection of her arms and her laws. According to the pleadings, he has, therefore, a right to maintain this action for adequate damages, unless Kentucky's amnesty statute of February, 1867, shall be held to be law in this case.

The magnanimity of the motive that prompted that generous enactment is both characteristic and commendable.

But whatever may be the policy of the enactment, of which we have no judicial right to judge, we are clearly of the opinion that the legislature had no constitutional power to make it (for divesting private rights) the law of the land, over which the constitution, which it so far violates, is the supreme law. And of this it is our official duty to judge as a court established for maintaining the constitution inviolate more than for any other purpose. And this sacred duty we must, as faithful sentinels of the people's guaranteed rights, honestly discharge, however unwelcome may be the inevitable task.

When that benevolent statute was enacted, the appellant had a vested legal right to recover the money of which he had been robbed, and this action for that purpose was pending in this court. Can any constitutional jurist doubt that the legislature had no power to divest that vested right without indemnifying the owner? That chose in action is "property," and very valuable property, and is therefore guaranteed by that great palladium of private property provided by the fundamental law of Kentucky,—"nor shall any man's property be taken or applied to public use without just compensation being previously made."

The statute neither provided nor contemplated any such compensation. And if the statute be enforced in this case, the appellant's property will thereby be taken from him for a

supposed public benefit without any compensation either paid or assured to him. While the constitution lives and reigns, and the judiciary shall be able to uphold it, this can never be. The conclusive logic of this simple statement of the case needs no further argument. Metaphysical elaboration could not clarify, but might only obscure, the meridian sunshine.

Our conclusion does not extend beyond civil remedies for private wrongs. And not doubting that conclusion, we adjudge that the circuit court erred in its judgment.

Wherefore the judgment of the circuit court in this case is reversed, and the cause remanded, with instructions to sustain the appellant's demurrer to the appellee's answer, and for further proceedings consistent with the foregoing opinion.

ORDER OF SUPERIOR OFFICER WILL JUSTIFY SOLDIERS' ACTS when: See *Taylor v. Jenkins*, 88 Am. Dec. 773.

WHO ARE ENEMIES OR ARE TO BE TREATED AS SUCH, in their persons and property: See the note to *Taylor v. Jenkins*, 88 Am. Dec. 779.

PRIVATE PROPERTY OF LOYAL CITIZEN CANNOT BE TAKEN in time of war unless absolute necessity exists therefor: *Taylor v. Jenkins*, 88 Am. Dec. 779; *Christian Co. v. Rankin*, 87 Id. 505, and extended note thereto; and the note to *Bell v. Louisville & N. R. R. Co.*, 89 Id. 632.

HYATT v. JAMES.

[2 BUSH, 433.]

MORTGAGES EXECUTED DURING CONTINUANCE OF CIVIL WAR by a citizen of one of the Confederate States to a citizen of one of the Union states, was illegal and void.

COURT WILL NOT PRESUME, IN ABSENCE OF OTHER EVIDENCE, THAT PAYEE OF NOTE, which appears by its face to have been executed in Memphis, Tennessee, was a citizen of Louisville, Kentucky, at a period six months earlier, merely because at that time and place the mortgage which was given to secure the debt was executed.

COURTS JUDICIALLY KNOW THAT MEMPHIS WAS IN FEDERAL MILITARY OCCUPATION in May, 1862, and within the confederate military lines in December, 1862.

ACTION upon a note and mortgage. The opinion states the facts.

Stites and Bullitt, for the appellant.

I. and J. Caldwell, and Bunch and Lee, for the appellees.

By Court, WILLIAMS, J. May 26, 1862, the decedent, Thomas James, executed his note to I. L. Hyatt for seven

thousand eight hundred dollars, due the next day. The evidence shows that both parties were then in the city of Memphis, Tennessee.

December 1, 1862, James executed to Hyatt a mortgage on real estate in the city of Louisville, Kentucky, to secure the payment of said debt.

In this mortgage it is recited that James is a citizen of Memphis, and Hyatt a citizen of Louisville, and this is the only evidence in the case as to their citizenship, and there is none as to their residence. James having died without paying any part of said debt, Hyatt, on May 17, 1865, filed his petition in the Louisville chancery court to foreclose his said mortgage, and for a sale of the land to which James' administrator was made a party, and by a subsequent amendment his heirs were also made parties.

The administrator, in his original and amended answer, set up for defense that the note was executed in consideration of treasury notes of the confederate government, which were worthless and illegal, and that it was executed during the war between the federal government and the insurrectionary states, and whilst the state of Tennessee was in rebellion against the United States government, and that Tennessee was a part of the confederate government then at war with the federal government, and that Hyatt was, at both the dates of the note and mortgage, a resident and citizen of Kentucky, and James was a resident and citizen of Tennessee.

John Bates, by petition, became a party, and set up a prior lien, and had his then pending suit against Thomas James also heard with this.

The court dismissed Hyatt's petition, and he prosecutes an appeal. The priorities between Hyatt and Bates not being adjudicated, it will not be noticed, as the only question for our determination is as to the legality of the note and mortgage, and whether judgment thereon should have been rendered against James's administrator and heirs. As Hyatt was in Memphis when the note bears date, the recitals of the mortgage of more than six months subsequent date do not establish that he was either a resident or citizen of Kentucky when the note was executed.

These recitals are sufficient evidence of his citizenship at their date, but do not prove that he was a resident of this state at the date of the note. It is averred in the defense that he was both a resident and citizen at the respective dates of the

note and mortgage; but as these stand denied, they must be established by proof.

We judicially know, as a part of the public and accredited historical facts of the Rebellion, that Memphis was within the confederate military lines at the date of the note, and was in federal military occupation at the date of the mortgage.

After due consideration, we have at the present term, in the cases of *Martin v. Hortin*, 1 Bush, 629, and *Anderson v. Whitlock*, 2 Id. 398 [*ante*, p. 489], held that the circulation of confederate currency within the confederate military lines, which had extended over a portion of the territory of this state, by citizens of the state resident within such military lines, was not illegal. That the citizen was not bound to flee his home and property, but might abide and conform to the rules and regulations of the military authorities of the enemy, until his own government might have the power and inclination, and actually oust that enemy, and afford him its own protection; much more would the circulation of confederate currency be wanting in illegality and viciousness between citizens who resided within a seceded state, which was then a member of the confederate government,—the policy of which was to encourage and facilitate the circulation of its own currency, and to prevent the circulation of the currency of its adversary.

The evidence shows that at the date of the note the confederate currency had an actual market value at Memphis exceeding the value of the federal currency, and that James bought with it cotton at from eight to ten cents per pound.

In the absence of proof, to presume that Hyatt was either a resident of or citizen of Kentucky at the date of the note would be to infer that his residence and citizenship were different from his then locality, and to presume that a contract was illegal without evidence to show its viciousness.

But whilst we will not infer that the note was given without any valuable consideration, nor that the consideration was illegal, yet the recitals of the mortgage show that Hyatt was, at its date, a citizen of Kentucky, whilst the mortgagor was a citizen of Tennessee.

The act of Congress of July 13, 1861, provided that in states repudiating the authority of the United States, "it may and shall be lawful for the President, by proclamation, to declare that the inhabitants of such state, or any section or part thereof where such insurrection exists, are in a state of insurrection against the United States; and thereupon all

commercial intercourse, by and between the same and the citizens thereof and the citizens of the rest of the United States, shall cease, and be unlawful so long as such condition or hostility shall continue. . . . Provided, however, that the President may, in his discretion, license and permit commercial intercourse with any such part of said section": 2 Bright. Dig. 193. The President of the United States had, previous to the date of said mortgage, issued his proclamation declaring the state of Tennessee to be in a state of insurrection, and forbidding all commercial intercourse between her inhabitants and those of the states adhering to the government, unless by license from the treasury department. There is no evidence that any license had issued, or even that a military permit had been granted to authorize this mortgage, or any authority for the mortgagor and mortgagee to deal with each other.

Mr. Wheaton, in his *International Law*, p. 556, sec. 15, lays it down that "it follows, as a corollary from the principle interdicting all commercial and other pacific intercourse with the public enemy, that every species of private contract made with his subjects during the war is unlawful."

It is said by Duer on *Insurance*, vol. 1, p. 478, that "a vested right, under a subsisting contract, is not affected by a subsequent war; but where the contract is executory, and would have been illegal if made in time of war, it becomes so from the time hostilities commence, as to all acts to be performed by either party during the war."

And Mr. Lawrence, in his edition of Wheaton, quotes, as part of note 176 to the above-quoted text, from an opinion of the attorney-general of Louisiana, declaring that a power of attorney executed in New York, after the commencement of the war, and without any license to transfer bank stock in one of the New Orleans banks, was illegal and void.

Even had this note existed before the war, so as to free its legality from all doubt, still under the act of Congress and the principles as recognized by Wheaton and Duer, this mortgage would have been illegal and void. And these principles are sanctioned by Judge Treat, of United States district court for Missouri, in *United States v. One Hundred and Twenty-nine Packages*, 11 Am. Law Reg. 419.

It follows, therefore, that the court erred in the dismissal of the appellant's petition as to the note, but should have rendered judgment thereon, as the mortgagor's administrator had personally appeared in the case; and for this reason alone the

judgment must be reversed; but as to the mortgage the dismissal was right.

Wherefore the judgment is reversed, with directions for further proceedings in accordance herewith.

EFFECT OF WAR UPON CONTRACTS BETWEEN BELLIGERENTS: See *Leathers v. Commercial Ins. Co.*, *ante*, p. 483.

JUDICIAL NOTICE, GENERALLY: See the note to *Lansford v. Mestier*, 89 Am. Dec. 663.

GRIGSBY v. BRECKINRIDGE.

[2 BUSH, 480.]

AUTHOR OF LETTERS SENT TO OTHERS RETAINS ONLY QUALIFIED PROPERTY in their contents to the extent of having the sole right to publish them; but that right entitles him to enjoin the publication of them by the recipient or any other person.

PROPERTY OF RECIPIENT OF PRIVATE LETTER, SENT WITHOUT RESERVATION of any kind, is absolute, except in so far as it is qualified by the incidental right of the author to publish or prevent publication of it, and the recipient may keep the letter, or destroy it, or dispose of it in any other way than by publication.

PROPERTY OF RECIPIENT AND AUTHOR OF PRIVATE LETTER is not joint. **PRIVATE LETTERS RECEIVED DURING HER GIRLHOOD AND FIRST MARRIAGE** from her first husband and others, as well as those received during her widowhood and second marriage from her second husband, are a woman's separate property, which she may, as between herself and her husband, keep or dispose of as she pleases, regardless of her husband's will.

SUIT in equity for injunction. The opinion states the facts.

J. F. Bell and J. M. Harlan, for the appellants.

Hunt and Beck, for the appellee.

By Court, ROBERTSON, J. In its aim, its principles, and its results, this is a novel and intensely interesting litigation.

Alfred Shelby was the first, and Robert J. Breckinridge the last, husband of Virginia Hart, who died on the 8th of May, 1859, while she was Breckinridge's wife. She had carefully preserved a large number of friendly and confidential letters which she had received during her girlhood, widowhood, and wedded life. And as proved by an answer to interrogatories made testimony by the code of practice, she had on her death-bed given and delivered them to Mrs. Grigsby, an only daughter of the first marriage. And on the 9th of September, 1859, Breckinridge, who in the mean time had been appointed ad-

ministrator of his deceased wife's chattels, brought this suit in equity against the appellants for enjoining the publication of any of the said letters, and for compelling the surrender of all of them to himself.

His petition, without intimating that the publication would affect the memory of his wife, or in any way subject him to loss or annoyance, claims that he is entitled to those letters either as administrator or surviving husband, and nowhere as mere author does he claim the possession of the letters written by himself.

As to all her letters, he says: "The letters are valuable and useful to him; and as administrator of his wife and as surviving husband, he is entitled to their possession." This is the only asserted title to the possession of any of the letters. As to business papers, consisting of accounts and receipts for her own expenditures for herself and family, and which the appellants surrendered to him by their answer, his petition says: "The plaintiff is advised that said papers at the time of removal, being in the actual custody of his wife, were legally in his possession, and were legally her property; that if he is not as husband the owner of them, still as survivor of his wife and as administrator of her estate, he is entitled to them; that as the writer of those letters addressed to his wife, he is interested in their contents, and is entitled to be guarded against any improper use or exposure of those confidential communications."

Thus, while he claims title to the possession of the accounts and receipts, he does not, as author, claim title to the possession of the letters written by himself, but only an injunction or other safeguard against their publication.

The answer by the appellants denied his right to any of the letters in any one of his threefold characters, and claimed that the respondent, Mrs. Grigsby, was entitled to their custody and curation as a sacred deposit confided to her by her dying mother to keep. The circuit court perpetually enjoined the publication, and ordered the surrender to appellee of the letters written to his wife by himself, and also of all letters received by her from other persons during their intermarriage.

The revision of that judgment involves interesting considerations of principle, analogy, and policy.

As the judgment excludes letters received before the last marriage, except those written by the last husband, and in-

cludes all letters received during that marriage, the circuit judge did not consider the appellee's authorship the sole test of his right, but must have thought that, either as administrator or husband, he was entitled to relief as to all letters received by his wife from others as well as himself while she was his wife. And even on this hypothesis, the judgment is unreasonable and inconsistent; for if any of her letters passed to him either as administrator or husband, the right was so devolved on him only because she had some special property in them as her own; and having the same title to all her letters, whenever and from whomsoever received, he had, as administrator and husband, precisely the same right to all, and therefore to those received from her first husband and other friends before her last marriage. All the letters, including those written by the appellee before and during his intermarriage with Virginia Shelby, are described in his petition as merely friendly and confidential communications, containing nothing which could, if published, affect his interest or his character. There is property in even such letters. By sending them, the authors parted with their right to the possession, control, or reclamation of them without her consent, and gave her the exclusive right to read and keep them for their enduring memories and sentiments.

This was her property, which might have been peculiarly valuable if estimated by only *affectionis pretium*, often exceeding the cash value. The authors also retained a qualified property in their contents, which they alone had the right to publish for their own benefit; and therefore, and also because they reflected their emotions and sentiments, they had the right to enjoin publication by the recipient or any other person. This was the author's property to its full extent.

These correlative rights of property are now established by abundant authority, fortified by principle and analogy.

The ancient common law recognized the exclusive right of the author of a literary manuscript to publish it for his own profit. That venerable code being silent as to private letters, it was long a debatable and controverted question whether the same principle applied to them, and defined this reciprocal right of author and recipient. But as such a manuscript may possess literary merits worthy of publication, and the author should have the right to decide for himself whether the publication would be useful to the public and profitable to himself, and as the letter, whether literary or not, is a tran-

script of his own mind, the modern common law, molded by the power of adaptation and expansion, seems now to be identical with the ancient, and applies the same doctrines to private letters; the same reasons, when sifted and expanded, apparently applying to each class of manuscripts equally and alike.

A production of the mind is property in every essential sense in which a production of the hands is the producer's property. And consequently in England, the mother of the common law, all her jurists and courts have long recognized the exclusive right of the author to publish his own literary manuscript; and as it is a reflex of his own mind, and the publication of it may be profitable, the same authorities treat the right to publish as his property to that extent. But as ordinary letters of friendship or on business may not be fit for profitable publication, many jurists and judges, ancient and modern, have denied that their authors, after delivery, have any property in them, and adjudged the entire property to be in the recipient. Nevertheless the modern common law, as expounded by preponderating authority, seems to recognize the author's right to publish even such letters as his property to the extent of that right, which he may protect by injunction against piracy or intrusion. And this may sufficiently appear from the following citations, British and American:—

British: *Pope v. Curl*, 2 Atk. 342; *Webb v. Rose*, cited 4 Burr. 2330; *Thompson v. Stanhope*, Amb. 737; *Forrester v. Waller*, cited 2 Brown Parl. C. 138; *Gee v. Pritchard*, 2 Swanst. 402; *Earl of Granard v. Dunkin*, 1 Ball & B. 207; *Miller v. Taylor*, 4 Burr. 2303.

American: *Woolsey v. Judd*, 4 Duer, 380; *Folsom v. Marsh*, 2 Story, 100; Story's Eq. Jur., secs. 943-949.

These consecutive cases, filling a century, and authenticated by such names as Hardwicke, Bathurst, Mansfield; and Eldon in England, and Story, backed by the voluminous and able opinion in the case of *Woolsey v. Judd*, *supra*, in America, are not only very persuasive, but should be held by this court as conclusive against the conflicting opinions, comparatively few, inconsistent, and inconclusive. The cited cases recognize in the recipient of a private letter, sent without any reservation, express or implied, the general property, qualified only by the incidental right in the author to publish and prevent publication by the recipient, or any other person. And as thus defined, such, and only such, is established as the property of each. And this general property implies the right in the

recipient to keep the letter or to destroy it, or to dispose of it in any other way than by publication,—the unqualified delivery of the letter being adjudged a gift of all the author's right to it, except his right to publish if existing, and to prevent the publication of it without his consent. The author and the recipient cannot hold a joint property, because that would entitle each to the possession, which, as to such a thing, would be absurd; nor, consistently with the adjudged cases, could the recipient's property, like that of a bailee, be special, because that would imply an uncertain right carved out of an undefined general property of the author, contrary to the principle recognized by all consistent jurists. The author's right to publication or non-publication being deemed his property, and only property, the protection of that property is the only adjudged ground of injunction against publication without his consent. Courts of equity have not yet assumed jurisdiction to enforce duties merely moral, or to prevent a breach of epistolary confidence or exposure of an epistolary secret in no way affecting any interest in property, however inconsistent such publication may be with honor or pure ethics. But the sole ground yet recognized for injunction is the protection of property. In the case of *Gee v. Prichard*, *supra*, Lord Eldon said: "The argument has confirmed doubts which have often passed in my mind relating to the jurisdiction of this court over the publication of letters; but I profess this principle, if I find doctrines settled for forty years together, I will not unsettle them. I have the opinions of Lord Hardwicke and Lord Apsley, pronounced in cases of this nature, which I am unable to distinguish from the present. These opinions have been acquiesced in without application to a higher court."

Subsequent cases in England and America have conformed to that discreet recognition of *stare decisis*, and that eminent chancellor added: "The doctrine is thus laid down, following the principle of Lord Hardwicke: I do not say I am to interfere because the letters are written in confidence, or because the publication of them may wound the feelings of the plaintiff; but if mischievous effects of that kind can be apprehended in cases in which this court has been accustomed, on the ground of property, to forbid publication, it would not become me to abandon the jurisdiction which my predecessors have exercised and refuse to forbid it,—such is my opinion." He further added: "The question will be, whether the bill has stated facts of which the court can take notice as a case of

civil property, which the court is bound to protect. The injunction cannot be maintained on any principles of this sort, that if a letter had been written in the way of friendship, either the continuance or discontinuance of their friendship affords a reason for the interference of this court."

And Story, in the second volume of his Commentaries, section 948, says: "The only ground upon which jurisdiction has been maintained is a right of property, literary or otherwise, in the writer of the letter." To the same effect are the American cases of *Wetmore v. Scovill*, 3 Edw. Ch. 315, and *Hoyt v. McKensie*, 3 Barb. Ch. 320 [49 Am. Dec. 178].

A majority of the American cases even deny the right of the author to enjoin the publication of a private letter on the ground of property. But as before suggested, we incline to the conclusion that the weight of authority, fortified by analogy, preponderates in favor of the author's special property in the publication, and in his consequential right to publish if he keep or can procure a copy. But the recipient is not bound to keep the original for his transcription, inspection, or other use. There is no adjudged case or elementary *dictum* extending the author's right of property beyond this circumscribed and contingent range. And all the cases cited in this case thus limit and define it.

Publication by the author is circulation before the public eye by printing or multiplied copies in writing. The like publicity by the act of the recipient would be an infringement of the author's exclusive right, which he may prevent by injunction. Publication is the same thing in kind, whether by the author or the recipient, and consequently the recipient may read the letters to a friend or deposit them for safe-keeping, without violating the author's right of publication. See also *Duke of Queensberry v. Shebbeare*, 2 Eden, 329, concerning Clarondon's History of the Rebellion; *Southey v. Sherwood*, 2 Mer., concerning Southey's Wat Tyler; *Macklin v. Richardson*, Amb. 694; *Coleman v. Wathan*, 5 Term Rep. 245; *Bartlette v. Crittenden*, 4 McLean, 300.

Consequently, as the author's right to this kind of publication of a letter is the only property which may be protected by injunction, the recipient may rightfully make any use of the letter which will not, in the same sense, amount to publication, without violating the author's exclusive right or entitling him to enjoin such lawful and consistent use.

In an able article on the author's right to enjoin the publi-

cation of private letters, Parker, an eminent judge in Massachusetts and professor in the Harvard law school, said:—

“The receiver of a letter is not a bailee, nor does he stand in a character analogous to that of a bailee. There is no right to possession, present or future, in the writer. The only right to be enforced against the holder is a right to prevent publication, not to require the manuscript from the holder in order to a publication by himself.

“The right of the receiver, then, is to the whole letter. He may read it himself and to others, and recite it at meetings. He may do everything but multiply copies, and perhaps he may do this, if he do not print them.”

His argument, published in the *Law Register* of June, 1853, with Redfield's apparent approbation, is very able, and is entitled to respectful consideration. With some slight exceptions, it harmonizes with our own views, and fortifies our own conclusions.

As already shown, in all the adjudged cases there is not even an intimation of the author's right to the possession or control of a private letter addressed to a friend, and no such title would be compatible with any of those cases, because it would be inconsistent with any exclusive right as adjudged by all of them to be in the receiver. The universally admitted title of the receiver to the paper necessarily involves and implies the title to it as given and received with the manuscript upon it, which is the soul of the letter, and the enjoyment of which, with all its suggestive associations and endearing memories, was the object of sending it to the chosen recipient. And moreover, the simple fact that the author may enjoin the publication of all such letters implies that, as mere author, he cannot, by suit, recover the possession; because, as the injunction is a frail security, the author, if entitled to the possession, would prefer to sue for that as the only safe assurance, and would not, as in all the cases, sue for an injunction only, and depend on that alone.

Thus we see the essential and characteristic difference between the right to enjoin publication and the right to compel a surrender of private letters, and the equally apparent and vital distinction between the author's property resulting from his right to enjoin and the recipient's property arising from his right to keep. And the cases establishing the first not only do not apply to the last, but, by inevitable implication, establish it, even if there had been no express adjudications

to the same effect. And it seems to us that principle, analogy, and authority equally establish the right of the recipient of all such letters to keep and read them whenever, like an album of photographs, the inspection of the chirography and perusal of the contents, with all their reminiscences, may suggest cherished recollections or excite pleasurable emotions. And this right might in many cases, like the present, be invaluable property in the holder. As a logical sequence, this peculiar property, exclusively and essentially personal, may be disposed of according to the holder's discretion, subject only to non-publication to the public gaze in such a manner as to violate the author's exclusive right.

When any such letters, as those in this case may be presumed to be, are interesting reminiscents of friends living and dead, they are more prized by the true owner than by any other person. Who else as certainly as Mrs. Breckinridge could be as much interested in often reading the letters written to her by her first husband when she was a girl and when she was his wife, and which she had so carefully preserved for that purpose? And who else could be as much concerned to read and preserve those written to her by her last husband when she was a widow and when she was his wife?

Such was the character and such the extent of her property in the letters confided to the custody of her only daughter, and it would be mockery to call it her property if it be of less extent, or legally subject to the control of her husband. Its peculiar character and dedication eminently distinguish it, like jewels, as her separate property, which she had the right, as between herself and husband, to keep and dispose of regardless of his will. And as already indicated, her testamentary deposit of them with her daughter, to keep as memorials of her mother and her correspondents, was no wrongful publication of them.

It seems to us, therefore, as a necessary consequence of the foregoing principles and authorities, that the appellee's wife, when she was about to die, and could not by her own custody preserve her letters any longer, had a right to secure their continued preservation and enjoyment by a gift and delivery of them to her own daughter, to keep and enjoy, and whom she seemed to prefer to her surviving husband as the custodian of a deposit so consecrated by her feelings and long possession and usufruct with his acquiescence in her asserted right until after her death. And by that solemn transfer and sacred

trust, she passed all her own right as separate property in perpetuity. Consequently, none of those letters, after that irrevocable alienation, constituted any portion of her intestate estate, which, if they could have been appreciable as assets, could have passed to the appellee as her administrator. Nor, for the same reasons, could they have survived to him as husband. He has no better right to control the letters of which he was the author than the others. In the letters he wrote to his wife before and during their intermarriage he had a peculiar property, which, to the extent of enjoining publication, he might make available; and to that extent the judgment is approved as allowable. But he has not prayed for a surrender of those letters, and would not, if he had sought it, have been entitled to it. Nor could we admit that, in this age and country, a husband's rightful authority gives him during marriage dominion over his wife's chaste and friendly correspondence not affecting his rights; nor that in all the plenitude of his marital power he could, without her free consent, take from her or destroy or in any way control the possession or gift of such letters. Any such ungracious interference with her confidential correspondence would impair social confidence, and disturb domestic peace, and ought not to be encouraged by the judiciary, especially as it could do him no other good than to gratify a jealous and prying curiosity. According to befitting decorum, and in every valuable sense, such letters written to her to keep and read and cherish are hers; and if she, for reasons satisfactory to her own taste and judgment, choose not to give or show them to her husband, she has a right to keep them to herself as her own inviolable property; and a confiding wife will never withhold from a true husband her confidential letters without some good and sufficient reason.

The existing code of both British and American law recognizes the personal individuality and moral responsibility of wives, and consequently guarantees their freedom of thought and of interchange of sentiments. Their ideas are their own, their emotions their own, and their affections their own. Here and now a husband must not be a tyrant, and ought not to be a spy over his wife, who is neither his slave nor his mistress, but should always be his free and equal companion. What law or policy gives her letters to him? And what property can he own in that which is of no appreciable value to him, and is for every purpose of use and safe-keeping hers?

As the appellee's transmission of his letters to his wife, without express limitation on her or reservation to himself, implied a gift to her separate use in any way except by publication, he could not, during her life, have compelled her to surrender them to his control or possession; and his apparent acquiescence in her exclusive possession and use until her death conclusively fortifies that legal presumption. During all that time his only right was to procure copies for publication by himself, if he had chosen to publish them as author, or to enjoin publication by herself. And had she not given them to her daughter, his right as author would not have been greater or better after than before her death. Her gift transferred her general property to her daughter, subject only to his right of publication, and the donee's obligation never to publish. The death of his wife gave him no other right. He still has the same and only the same right to publish or enjoin publication on the ground of his special property, resulting alone from his right to publish, and in no degree from any apprehension of an exposure not affecting that special property. His right to enjoin publication still remains unimpaired. But as author he has no right to the possession of the letters.

As to her other letters, the authors alone could enjoin publication; and as she parted with all her right to them, no other person than her transferee has any legal right to their custody. That transfer to keep was not publication; but could it be so construed, it would only illustrate his right to an injunction.

We are therefore of the opinion that while the appellee was entitled to an injunction against the publication of the letters written by himself to his wife, he was entitled to none to prevent the publication of any of her other letters; and we are of the opinion, also, that he was not entitled to a judgment for a surrender of any of her letters.

Wherefore the judgment is reversed, and the cause remanded, with instructions to enjoin the publication of the letters of which the appellee was author, and to dismiss the petition as to all else.

WILLIAMS, J., delivered a dissenting opinion. After stating the facts, he says in substance as follows: The plaintiff avers that the letters sued for were taken by defendant, Susan B. Grigsby, from the possession of his wife, and that he is advised "that said papers at the time of removal, being in the actual custody of his wife, were legally in his possession and legally his

property. If he is not, as husband, the owner of them, still, as survivor of his wife and as administrator of her estate, he is entitled to them, and as writer of them, is entitled to be guarded against exposure of their contents." His prayer is that the letters may be returned to him, and that in the mean time defendants be enjoined from publishing, destroying, or delivering to others the said letters, or any of them.

I have made the above quotation to show that Breckinridge set up claim to these letters and papers in the character of author, surviving husband, and administrator of his deceased wife, and prayed a return to him of all the letters, not in the character of husband or administrator alone, but in all his rights; and to say that he claims "either as administrator or surviving husband, and nowhere as mere author," is a clear misunderstanding of his assertion of right and title. If Mrs. Grigsby obtained them wrongfully or without Mrs. Breckinridge's consent, her possession is improper, and the court will relieve against it. Another of plaintiff's allegations is, that the said letters contain accounts and other evidence of expenditures necessary to an administration of the estate. Defendant in her answer alleges that all the letters in her possession had been put in a box by Mrs. Breckinridge, and then given to her, the defendant; and she further avers that none of the letters so given are in any way valuable or necessary to the proper administration of the estate of Mrs. Breckinridge; and further, that she is unable to state whether such letters as are sought are in the box containing the letters given to her by Mrs. Breckinridge.

Tested as a pleading, the answers of defendant are insufficient, for the defendant neither admits nor denies having the letters sought, nor does she deny having information upon which to found a belief. Nor can the answer be read as a deposition, for besides the fact that it is not in response to any interrogatories, there is nothing in the record showing an intention to so use it. And since the case is made on the pleadings alone, no other evidence having been introduced, there is no evidence whatever of the fact that Mrs. Breckinridge gave Mrs. Grigsby the letters, and plaintiff should have judgment.

But whether defendant's answer is to be regarded as a deposition or not, and whether or not it be assumed that she received the letters sued for as a gift from Mrs. Breckinridge, she has no legal right to retain them against plaintiff's claim. The question is simply whether a wife can by gift to an alien to her husband's family part with his social, confidential letters to her, and thus put them beyond his reach, subject to the gaze of the idle and curious, etc. This is the first case, so far as known, where the question has arisen after the death of the recipient of the letters. Lord Hardwicke, in *Pope v. Curl*, 2 Atk. 342, said that the property of a receiver of letters is only special; that the property in the paper may belong to him, but that this does not give him license to publish them to the world; and that at most the receiver has only a joint property with the writer. And this is quoted in 2 Story's Eq. Jur., sec. 944. In section 945, Story, commenting upon an early case, says that the property of receivers of letters is certainly qualified in some respects; that by sending it the writer gives to the receiver a property for the purpose of reading it, and perhaps of keeping it, but in any event, beyond the purpose for which the letter is sent, the property is in the sender. That the general property is in the writer and the special property in the receiver, is established by the English courts, as well as by the writings of Story, and I believe that not a single case has gone to the extent of permitting the receiver during his life to bestow the property in a letter upon another.

But suppose the rights of the parties be put upon the theory of joint ownership, still would the survivor be entitled to its possession and control.

The property of a receiver of letters, however, unless they be necessary to vindicate rights of property or character, is essentially a life estate; and when the receiver dies the whole special property in him is extinguished, and the entire property is then in the author. This proposition, and the rights of the writer in letters, was once denied in England, in *Percival v. Phipps*, 2 Ves. & B. 19, but the decision was not essential to the matter before the court; and in a subsequent case, *Gee v. Pritchard*, 2 Swanst. 402, this case was overruled, and has since ceased to be regarded as authority in England. It was, however, followed in New York, in *Wetmore v. Scovill*, 3 Edw. Ch. 515, and *Hoyt v. Mackenzie*, 3 Barb. Ch. 320. But both of these cases have since been overruled by *Woolsey v. Judd*, 4 Duer, 382, and are no longer regarded as authority. Some writers have confounded publication with printing, claiming that the thing which is restrained is the printing or multiplication of copies. But this principle is unsound. It is the publication which is prohibited; and publication, as defined by Bouvier, is "any act by which a thing is made public," and Webster's definition is in effect the same. And this is so, upon the theory, as said in *Woolsey v. Judd*, *supra*, that an author has exclusive property in his unpublished manuscript.

I think the letters written by plaintiff should be surrendered to him, and as to the other letters, the writers are entitled to them; but the plaintiff has no better right than the defendant in them.

PROPERTY IN LETTERS GENERALLY: See note to *Hoyt v. Mackenzie*, 49 Am. Dec. 181.

CASES
IN THE
SUPREME COURT
OF
LOUISIANA.

FOLTIER v. SCHRODER AND SCHREIBER.

[19 LOUISIANA ANNUAL, 17.]

FORGED INDORSEMENT OF NEGOTIABLE BILL PASSES no title to it, even to an innocent indorsee, and no holder can recover the amount of it from the drawers without alleging and proving the payee's indorsement.

ACTION CAN BE MAINTAINED ON NOTES and obligations only by those in whom the legal title is vested.

PAYEE FOR VALUE OF BILL OF EXCHANGE duly protested for non-acceptance, with notice, cannot be affected by an agreement in regard to the bill between the drawers and a third person who has possession of it, without any transfer or indorsement from or under the payee.

BILL MADE PAYABLE TO PARTY'S ORDER vests the title to it in him, and to divest him of it, a transfer from him or his indorsement is necessary.

DELIVERY OF BILL OF EXCHANGE is essential to create a lien by way of collateral security or as a pawn.

THE opinion states the case.

Robert and Tissot, for the plaintiff and appellant.

Durant and Hornor, for the defendants and appellees.

By Court, **ILSLEY, J.** The plaintiff, who is the payee and holder of the first of the set of a foreign bill of exchange, duly protested for non-acceptance, with notice to the drawers, the defendants in this suit, claims from them the amount of it, with damages and interest.

The answer is a general denial; and there is also a special defense.

The action was dismissed by the court below, because the third bill of the set was not produced or accounted for by the plaintiff.

The doctrine upon which the decision was rendered is, when applied to a state of facts such as that presented in the case of *Wells v. Whitehead*, 15 Wend. 527, the correct one on principle; and if in this case it could be properly applied, it would be unnecessary to examine the other issues raised.

The plaintiff produces the first bill of the set of exchange, duly protested for non-acceptance by the drawee, with notice to the drawers; and this, upon the authority of *Downes v. Church*, 13 Pet. 205, establishes a *prima facie* title in him as the payee, which, however, may be displaced by the defendants, if they can show that the holder of any other of the set may recover on it.

This is a matter of defense, as the law will not presume that the other bills of the set have been negotiated to other persons, and the defendants, therefore, on the trial of the case in the lower court, showed that the third bill of the set (a copy of which, with the protest annexed, is in the record), was the first one protested for non-acceptance.

As the third bill is out, and purports to bear the indorsement of the payee, the plaintiff in this suit, he cannot maintain his action without producing or accounting for this third part, or making satisfactory proof that the payment to him of the bill declared upon will, in accordance with its tenor, exonerate the defendant from all legal liability hereafter to any holder of the other bill.

It is proved, and admitted by the defendants, that the plaintiff never saw the third bill, and that his name indorsed on it is a forgery. Now, as a forged indorsement of a negotiable bill passes no title to it, even to an innocent indorsee (see *Jackson v. Commercial Bank of New Orleans*, 2 Rob. (La.) 129 [38 Am. Dec. 204], and *Dick v. Leverich*, 11 La. 173), and no holder of this third bill could recover the amount of it from the drawers without alleging and proving the payee's indorsement, the defendants, therefore, can have nothing to apprehend from any claim which a holder of it might hereafter assert; particularly as they allege in their answer that the bill was overdue as soon as the first protest was made.

It is a well-established principle of law, that an action can only be maintained on notes or obligations by those in whom the legal title is vested; but in the present case, with proof in the record that there is no indorsement on it by the payee, the plaintiff has a standing in court, and his action upon the

first bill of the set should not, for the reasons assigned by the court, have been dismissed.

The question to be determined in this case is, whether the plaintiff, who is the payee for value of the bill of exchange in suit, duly protested for non-acceptance, with notice, can be affected by an agreement in regard to the bill between the drawers of it, the defendants, and a third person, who held the mere possession of it, without any transfer or indorsement from or under the payee.

To solve this question as it is here presented, it is necessary to advert to the principal facts which give rise to it. The plaintiff, the Abbe Foltier, received the first and second bills of the set from one Eugene Darolles, who purchased it from the drawers, and caused it to be made payable to the order of the Abbe Foltier, whose funds were invested in it, under the following circumstances: Darolles was to forward from New Iberia to New Orleans, and there to sell sixty bales of cotton for the Abbe, and to transmit the proceeds of sale to the Abbe's brother in France. Being, however, unable, from an uncontrollable cause, to attend to it, Dr. Darolles, his son, undertook the business, and effected a sale of the cotton; but deeming his father, who was in the city of New Orleans, the chosen friendly agent of the Abbe, and the proper person to terminate the transaction, he placed the proceeds of the sale in his hands, instead of depositing them with some designated person in the city, according to the Abbe's request. At the earliest practical moment the Doctor informed the Abbe of the disposition he had made of the fund, and that his father had invested the Abbe's money for his account in a bill of exchange. Owing to the difficulty of passing through the military lines, it was only some time afterwards that the Abbe obtained an interview with Darolles, who confirmed the statement of his son as to the receipt by him of the Abbe's money, and the purchasing for him and in his name from the defendants the bill of exchange now in suit; and as corroborative thereof, Darolles exhibited to the Abbe his memorandum-book, wherein the whole transaction was noted, and placed in his hands the first and second bills of the set, the third being, as Darolles said, in his trunk, to be delivered afterwards.

The plaintiff and defendants being, as drawers and payee of a bill of exchange, the original parties to it, the consideration of it would, under the commercial law, be a fair subject of in-

quiry; but the defense does not rest upon that, as the drawers received full value for the bill.

It grows out of an agreement in relation to it between them and Darolles, who had received from them seven thousand dollars, to be invested by him in the purchase, at Attakapas, of cotton and sugar on joint account.

The defendants having but a casual acquaintance with Darolles, it was agreed between him and them that they should retain the bill in their possession by way of collateral security; but upon Darolles's representation that the bill would be useful to him in his operations in the interior, the defendants permitted him to hold it, with the understanding, however, that he was not to part with it till they received sufficient produce to cover it.

The defendants have sued Darolles to compel him to refund their money received by him, and in their petition in that suit, which is still pending in this court, they aver that Darolles entirely failed to invest the fund placed by them in his hands; and they now, as a defense in this suit, say that the bill of exchange in controversy is the property of Darolles, and not that of the Abbe, and that it is subject to their claim, of which, previous to the Abbe's receiving it, he was well aware, and also that they had ordered it to be protested.

A careful examination of the evidence in the record has convinced us that the bill was bought by Darolles, with the Abbe's money and for his use.

Nothing shows that he was connusant of any agreement in regard to it, made with the defendants by Darolles, and as the Abbe was no party thereto, his right to claim the contents of the bill is incontrovertible.

Had the defendants a valid defense to oppose to the plaintiff's action, the intimation or notice by them, given to him, that they had ordered it to be protested might be properly considered; but satisfied as the plaintiff was that the defendants had received his money as the consideration of the bill, and that they had, by making him the payee of it, put the title to it in him, he may well have supposed that if the drawees would not accept it, the drawers, who were solvent, would be bound, after protest and notice to them, to pay it.

But what is the nature of the defendant's claim to or upon the bill? Is it one of ownership, or a lien by way of privilege? The bill being payable to the plaintiff's order, the title to it is

in him, and to divest him of it, a transfer from him or his indorsement would be necessary.

As a lien by way of collateral security or a pawn, the bill indorsed by the payee should have been delivered to the pledgee, as delivery is of the essence of that species of contract: See act of 1855, No. 287, sec. 1; *Lee v. Bradlee*, 8 Mart. 57; *Sewall v. McNeill*, 17 La. 185, 428; *Robinson v. Shelton*, 2 Rob. (La.) 277; *Fluker v. Bullard*, 2 La. Ann. 338.

It was certainly in the power of the drawers of the bill, when confiding their money to Darolles, to impose upon him their own terms and conditions. Why, then, was the Abbe, and not Darolles, made the payee of the bill? and why did they not insist on the delivery of it to them?

It is very apparent, from this incautiousness on the part of the defendants, that they attached but little importance to the bill as collateral security for their money advanced to Darolles to invest, on joint account, in staple products. In their suit against Darolles for the recovery of their fund, no allusion is made in their pleadings to this collateral security, and the *remittitur* for the amount of the bill in the body of the judgment is so evidently an afterthought as to render it unworthy of notice; and no greater weight can be attached to the entries in their books, which were improperly received as evidence for the defendants: See C. C., art. 2244.

The main reliance of the defendants to defeat the plaintiff's action is placing the title to the bill, not in the Abbe, but in Darolles, and to this end they direct our attention to the evidence given by the plaintiff in their suit against Darolles. Our interpretation of this evidence, which we reach, not from isolated phrases, but from its whole tenor, differs altogether from that put upon it by the defendants. It appears that the proceeds of the Abbe's cotton exceeded in amount the sum paid for the bill, and to obviate all difficulty in a settlement with the Darolleses, the Abbe was willing, if the bill was paid, to grant a full acquittance for the whole. The case of *Clan-non v. Calhoun*, 10 La. Ann. 460, referred to by the defendants, is very different from this one, in which the plaintiff's title to the bill is patent upon its face, whilst in the case cited the note sued on was specially indorsed, not to the plaintiff, but to another person, and this would have been the position of Darolles had he instituted a suit against the defendants.

The plaintiff is the legal holder for value of the bill drawn by the defendants, and his equity is greater than theirs, and

their defense to his action cannot, therefore, prevail. "Where the loss has fallen, there it must be," is an axiom of the law; its application, however, by the defendants should have been made to their own condition, and not to that of the plaintiff.

The plaintiff is entitled to a judgment for the amount of the bill, twenty thousand francs, or the admitted equivalent in dollars therefor (3.50 francs per dollar), say \$5,714.25, with damages, interest, and costs.

It is therefore ordered, adjudged, and decreed that the judgment of the district court be annulled, avoided, and reversed.

It is further ordered, adjudged, and decreed that the plaintiff, Eugene Jules Foltier, do recover from and have judgment against the defendants, the commercial firm of Schroder and Schreiber, and against the individual members of the said firm, Antony Schroder and Christian Schreiber, *in solido*, for the sum of twenty thousand francs (20,000f.), or the admitted equivalent therefor in United States money (*viz.*, 3.50 francs per dollar), say \$5,714.25, and as damages ten dollars upon the hundred dollars, upon the principal sum, above stated, with five per cent interest upon the aggregate amount of the principal sum, and the damages thereon, from the seventh day of September, 1864, until paid. It is further ordered that the defendants and appellees pay all costs in both courts.

FORGED INDORSEMENT PASSES NO TITLE to bill or note assignable by indorsement: *Jackson v. Commercial Bank*, 38 Am. Dec. 204, and note 205.

TITLE NECESSARY TO MAINTAIN ACTION on bill of exchange: *City Bank etc. v. Perkins*, 86 Am. Dec. 332, and note.

PAYEE'S RIGHT TO RECOVER ON NOTE cannot be defeated by a secret agreement between the maker and a third person: *Foy v. Blackstone*, 83 Am. Dec. 246; *Rice v. Ragland*, 53 Id. 737.

BILLS AND NOTES PAYABLE TO ORDER can be negotiated only by indorsement: *Smalley v. Wight*, 69 Am. Dec. 112, and note 114.

DELIVERY OF NOTE IS ESSENTIAL TO ITS VALIDITY: *Foy v. Blackstone*, 83 Am. Dec. 246, and note; note to *Catlin v. Gunter*, 62 Id. 118.

DUBUC v. VOSS.

[19 LOUISIANA ANNUAL, 216.]

THAT POWER TO REMOVE is incident to the power to appoint does not apply to governors of states. Their power to remove is generally limited to particular cases provided for by statutory enactment.

GROUND UPON WHICH GOVERNOR MAKES REMOVALS should not needlessly be subject to the scrutiny of the courts, and liable for slight reasons to be annulled by judicial decree; but if there appears to be a reckless

violation of power, the judiciary may inquire whether the executive has infringed the law.

WHERE GOVERNOR ISSUES COMMISSIONS FOR SAME OFFICE, on different dates, to different parties, and the one last issued recites that the party therein named is appointed in place of the person named in the first commission, who is removed, it is presumed that the commission last issued is the one legally in force. But this presumption in favor of the proper exercise of the power of removal is subject to be overthrown by countervailing evidence.

PRESUMPTION IS, THAT EVERY PUBLIC OFFICER performs his duties properly.

THE opinion contains the facts.

A. and M. Voorhies, for the plaintiff and appellee.

Filleul, for the defendant and appellant.

By Court, TALIAFERRO, J. The parties to this suit contend for the office of inspector of weights and measures for the second district of New Orleans. They confront each other with commissions for the same office, derived from the same authority. The plaintiff's commission bears date the 28th of March, 1866; that of the defendant the 16th of November, 1866.

Upon receiving his commission, Voss, the defendant, gave public notice of his appointment. He also demanded from his competitor the public property and the appropriate implements of the office, which were refused. The plaintiff, Dubuc, took out a writ of injunction against the defendant, restraining him from exercising the duties of his office. When the case was tried in the court below, judgment was rendered in favor of the plaintiff, perpetuating the injunction, and the defendant has appealed.

There is no need in this case to go far into the inquiry whether the power to appoint to office implies the power to remove. A mere arbitrary power to remove, depending solely on the will or caprice of the executive, and to be exercised without good cause, the *sic volo sic jubeo* principle was surely never accorded by the genius of American institutions. The doctrine of Mr. Madison, in regard to the right of removal by the President of the United States, was founded in considerations of public utility, and proceeded upon the assumption that the power of removal, in the hands of that high functionary, would be exercised with a nice discretion, and for right purposes. But in the progress of time, it has been found that this right is liable to abuse, even by the chief executive officer of the nation, and the last Congress has wisely limited its exercise. That the power to remove is incident to the power

to appoint we are not aware has ever been contended for as appertaining to the governors of states. The character of their functions is not, in all respects, analogous. Their power of removal, we apprehend, is generally limited to particular cases provided for by statutory enactments. It would seem to derogate from the efficiency of the chief executive officer of a state, and to lower the dignity of his office, if the grounds upon which he makes removals would be needlessly subject to the scrutiny of the courts, and liable, for slight reasons, to be annulled by judicial decrees. But there must somewhere be protection to the honest and faithful incumbent, if unhappily his right to hold office should be recklessly violated by the head of the executive department. To the judiciary, in such a case, would attach the delicate and ungrateful duty of inquiring whether the executive had infringed the law. Such cases, we may hope, will be of rare occurrence.

The only evidence before the court in this case are the two commissions. Both cannot have effect. If the one first issued continues in force, the last is simply null. If the latter is valid, it supersedes the former. The commission to Voss recites that he is appointed in place of "Joseph Dubuc, removed." The act of 1855 (sec. 13), relating to the subject of weights and measures, authorizes the governor, in a certain contingency, to remove inspectors of weights and measures: Acts of 1855, p. 362.

The presumption is in favor of every public officer that he performs his duties properly. In the case now before us, the presumption is, that the commission last issued is the one legally in force. That presumption is strengthened by the official declaration on its face, that Dubuc was removed, and by the fact that the governor, by the act of 1855, has in a certain contingency the right to remove an inspector of weights and measures. But this presumption in favor of the proper exercise of power by the governor was subject to be overthrown by countervailing evidence, if it were in the power of the complainant to produce it. But no such evidence was introduced; and in its absence, the presumption that the commission of Voss legally supersedes that of Dubuc must prevail.

It is therefore ordered, adjudged, and decreed that the judgment of the district court be annulled, avoided, and reversed. It is further adjudged and decreed that the plaintiff and appellee pay costs in both courts.

Rehearing refused.

POWER TO APPOINT OR REMOVE OFFICER from office must be strictly pursued: *Commonwealth ex rel. Bowman v. Süfer*, 64 Am. Dec. 680.

REMOVAL FROM OFFICE WHEN EFFECTED by appointment of another to the same office: *Commonwealth ex rel. Bowman v. Süfer*, 64 Am. Dec. 680.

COURT WILL PRESUME THAT OFFICER HAS PERFORMED HIS DUTY: *Culbertson v. Mithollen*, 85 Am. Dec. 428, and note; *Commonwealth ex rel. Bowman v. Süfer*, 64 Id. 680, and note 685.

THE PRINCIPAL CASE IS CITED in *State ex rel. Richardson v. Graham*, 25 La. Ann. 74, to the point that where an act creating an office authorizes the removal of the officer under certain circumstances, the removal of such officer is presumptive evidence that he was removed for proper cause.

PINO v. MERCHANTS' MUTUAL INSURANCE CO.

[19 LOUISIANA ANNUAL, 214.]

WAIVER BY PAROL MAY BE PROVED OF CONDITION IN POLICY OF INSURANCE that "no insurance shall be considered as binding until the actual payment of the premium," the plaintiff may prove by parol a waiver of such condition by the company, as such proof does not alter or vary the written contract.

CONDITION IN POLICY OF INSURANCE that "no insurance shall be considered as binding until the actual payment of the premium," is a condition which the insurers have a right to insist upon; but being a stipulation in their own interest, they may waive it if they choose.

PROOF OF FRAUD IS NOT ADMISSIBLE under a general denial.

SPECIAL PLEA IS NECESSARY IN ACTIONS ON POLICIES OF INSURANCE of all matters which show the transaction to be void or voidable on the ground of fraud, misrepresentation, or concealment.

CONTRACT OF INSURANCE IS COMPLETE when the insured makes application for insurance, the application is accepted, the policy filled out in duplicate, and the applicant's name entered on the books of the company as being insured; and if he is not required at that time to pay the premium, or notified of a stipulation in the policy requiring payment of the premium as a condition precedent to its binding force upon the company, the latter will be deemed to have waived such condition.

THE opinion contains the facts.

Dufour, Castera, and Hunt, for the plaintiff and appellee.

Gurley, Pierce, and A. and M. Voorhies, for the defendants and appellants.

By Court, **TALIAFERRO, J.** The plaintiff alleges that defendants insured for him against loss by fire, to the extent of \$6,000, a stock of wines, liquors, etc., and his household furniture, all of which were stored in a house on Gasquet Street; that after this contract of insurance a fire occurred in the house containing the goods insured, by which he suffered loss

and damage to the amount of \$2,086.42; that he established this loss by the means and within the time he was required by the policy of insurance, but that defendants refuse to pay the said loss which they insured against. He prayed judgment for the specified sum, with legal interest from the time the same became due.

The defendants in their answer plead the general issue. They deny that they are bound to the plaintiff, according to the conditions of the policy, and aver that plaintiff, without notice to them, paid the premium after the occurrence of the fire.

The plaintiff had judgment in his favor in the court below, and the defendants have appealed.

It appears that the plaintiff applied for the insurance on the 25th of February, and that the fire occurred about one o'clock on the morning of the 1st of March following; that plaintiff went in the course of the same day to the office of the insurance company, and that without saying anything about the fire, of which the defendants were ignorant, paid the premium and got the policy of insurance.

There are only two questions of importance in this case, and they are embodied in two bills of exceptions taken by defendants to the admission of testimony. These we will consider in their order.

1. The plaintiff declares upon the policy. The policy contains this condition: "No insurance, original or continued, shall be considered as binding until the actual payment of the premium." The plaintiff offered to prove by a clerk in the insurance office that the insurance company are not generally paid the premium at the time the policy is delivered. The defendants objected to the evidence, on the ground "that it tended to prove a usage contrary to the express terms and conditions of the written contract sued on; and that the stipulations and conditions thereof cannot legally be contradicted or varied by proof of the existence of any such custom or usage." It may be here noted that plaintiff also offered six different receipts of various dates, given by the insurance company, showing the payment of premiums to them after the lapse of a month or more from the time at which the insurance commenced to run. The introduction of these receipts was objected to on the same ground.

The proof of the rule or practice of the insurance company in this particular does not vary or contradict the written con-

tract, and we think it was properly admitted. The condition was one which defendants had the right to insist upon, but being a stipulation in their own interest, they had a right to waive it. That it was the general usage of the company not to require payment at the time of delivery, the policies might properly be shown to establish only the waiver in most cases of the express condition.

2. The defendants offered to prove a breach of warranty on the part of the plaintiff; that he represented the building he proposed to insure as a two-story brick house, covered with slate, when, in fact, the house was constructed of wood. The introduction of this testimony was objected to on the ground that the defendants' answer contained only a general denial, and that fraud was not alleged. The objection was sustained by the court, and the defendants reserved their bill of exceptions.

We think the ruling of the court correct. Several decisions of this court have recognized the rule, in cases of this kind, that all matters which show the transaction to be void or voidable in point of law on the ground of fraud, or otherwise, shall be pleaded specially: *Kennedy v. New York Life Ins. Co.*, 10 La. Ann. 811; *Matthews v. General Mutual Ins. Co.*, 9 Id. 590; *Kathman v. General Mutual Ins. Co.*, 12 Id. 38; *Flinn v. Merchants' Mutual Ins. Co.*, 17 Id. 135.

The prevailing rule seems to be, in regard to policies of insurance, that misrepresentation, concealment, etc., must be specially pleaded: 2 Arnould on Insurance, p. 1287.

It is in proof that several days before the occurrence of the fire the plaintiff made application at the office of the defendants for insurance; that the application was filled out by the secretary; that the policy was made out in duplicate, and the plaintiff's name entered on the books as being insured. It is not shown that the plaintiff was required at that time to pay the premium, or that he was informed that the insurance company would not be bound until the money was paid. The proposition to be insured was accepted, a policy made out, and a duplicate kept in the records of the company. The contract was complete, and without any doubt so considered by both parties. No intimation whatever seems to have been given to the plaintiff that he would form an exception to the company's general usage to waive a strict compliance with the stipulation in the policy requiring payment of the premium as a condition precedent to its binding force upon the company. There can

be no doubt that the insurance company could have compelled payment of the premium in an action against the plaintiff.

We think it clear that the contract was complete on the 25th of February, the date of the policy; and that the delay of the plaintiff until the first of March to pay the premium, and that after the fire had occurred, had no effect upon the obligation of the contract.

It is therefore ordered, adjudged, and decreed that the judgment of the district court be affirmed, with costs.

Rehearing refused.

ADMISSIBILITY OF PAROL EVIDENCE to vary or modify contract of insurance: *Ripley v. Aetna Ins. Co.*, 86 Am. Dec. 362, and note 371; *Sheldon v. Conn. Mut. F. Ins. Co.*, 65 Id. 565.

GENERAL AGENT OF INSURANCE COMPANY MAY WAIVE CONDITION IN POLICY that no insurance shall be considered as binding until the actual payment of the premium: *Sheldon v. Atlantic etc. Ins. Co.*, 84 Am. Dec. 213, and note 219; *Keeler v. Niagara Fire Ins. Co.*, 84 Id. 714. Further, as to waiver of conditions in policies of insurance, see *Mubrey v. Shawmut Mut. Fire Ins. Co.*, 81 Id. 689, and note 690; *Ripley v. Aetna Ins. Co.*, 86 Id. 362, and note 372; *Union Mut. Fire Ins. Co. v. Keyser*, 64 Id. 375; *Sheldon v. Conn. Mut. Fire Ins. Co.*, 65 Id. 565, and note.

EVIDENCE OF FRAUD IS INADMISSIBLE under the general issue; it must be specially pleaded: *Jenkins v. Long*, 81 Am. Dec. 374, and note 376; *Fahie v. Pressey*, 80 Id. 401, and note 405.

FRAUD, WHEN SET UP AS MATTER IN AVOIDANCE of a contract of insurance, must be specially pleaded: *Hoxie v. Home Ins. Co.*, 85 Am. Dec. 240, and note 251.

CONTRACT OF INSURANCE, WHEN COMPLETE: *Sheldon v. Conn. Mut. Fire Ins. Co.*, 65 Am. Dec. 565, and note 571; *Commercial Ins. Co. v. Hallock*, 72 Id. 379, and note. The former case shows when the payment of the premium is not a condition precedent to the taking effect of the contract of insurance.

HARVEY AND WIFE v. POTTER.

[19 LOUISIANA ANNUAL, 264.]

PROPRIETOR HAS RIGHT TO EXCAVATE CANAL for the purposes of navigation entirely within his own boundaries, and to require payment for its use by all who choose to avail themselves of its facilities.

WHEN PROPRIETOR CONSTRUCTS WORKS useful for the public upon his private property, and the public enjoys the benefit of these works, equity requires that for the benefit received compensation must be returned, no matter under what name it is claimed. The use of the terms "tolls and charges" does not defeat the right of recovery.

THE opinion contains the facts.

Saucier, for the plaintiffs and appellees.

Roselius and Phillips, for the defendant and appellant.

By Court, TALIAFERRO, J. The plaintiffs sue for "tolls and charges," which they aver defendant owes them for the use of a canal constructed upon their own land, and kept in order at their own expense. The answer is a general denial, with the special averment that plaintiffs have no right to exact such charges. The plaintiffs had judgment in the court below, and the defendant has appealed.

It seems that the plaintiffs, owning a body of land in the parish of Jefferson, right bank, extending from the Mississippi River five or six miles back to the bayou Barrataria, have enlarged and much improved a canal, constructed originally by the late Mr. Destretien, father of Mrs. Harvey, one of the plaintiffs; that this canal affords navigation for boats of considerable size; and that great facilities are offered by it for transporting from the interior wood, lumber, fish, and other commodities destined for the New Orleans market.

The defendant, it is shown, has for a considerable length of time availed himself of the use of this canal in boating wood and lumber to the market.

The plaintiffs have fully established the facts they have alleged, and the only question presented is, Has the proprietor of a tract of land the right to excavate, entirely within his own boundaries, and exclusively at his own expense, a canal for the purposes of navigation, and to require payment for its use by all who choose to avail themselves of its facilities? It is not easy to perceive how, in such a case, the public become seised of the right to the gratuitous use of advantages afforded by individual labor and enterprise. The right of expropriation, it is true, belongs to the public, and the land and canal so constructed upon it might, under constitutional and legal provisions, become public property, and be appropriated to public use. But where no public need exists for such conversion, and the property in its entirety is subjected to private ownership, it would seem that the proprietor has the right, in any manner he deems best, to render that property most productive, subject only to the rule, *Sic utere tuo ut alienum non lædas*. We are unable to see that the means used by an owner to increase the value of his property makes any difference in regard to his right to avail himself of the profits arising from the lawful exercise of such means. If he constructs

works useful for the public upon his private property, and the public think proper to enjoy the benefits of these works, equity would certainly require that for the benefit received compensation should be returned. Private property shall not be taken for public uses without ample remuneration first made to the owner. This is a fundamental principle. So it would seem clearly to follow that private property cannot be used by the public without compensation for that use. Suppose the plaintiffs in this case should refuse to permit the defendant to use their canal, would an action of damages lie against the owner? If not, it must appear that the defendant is not entitled to require the use of the canal free of charge, as he would have to require the free use of a navigable stream or a public road. But the defendant bases his refusal to pay the charges demanded by plaintiffs on the ground that these charges are presented in the shape of tolls, or rather that the plaintiffs call them tolls.

The plaintiffs in their petition use the terms "tolls and charges." The objection is, that no one can exact the payment of a toll unless he has been vested with a franchise by an act of the legislature which enables him to do so. This objection would be valid if applied to the pretensions of a person who without such franchise should demand toll on a public highway. But it does not appear that the canal in question has in any manner been constituted a public highway. We are referred by the defendant to the case of *Boykin v. Shaffer*, 13 La. Ann. 129. In that case there was some color of right under a franchise. The legislature had conferred upon a navigation company certain privileges, and the company made a contract with Shaffer to do a part of the work, for which it granted to him the privilege of building locks to improve the navigation of a bayou, and the right to demand toll for the use of the locks. The question seemed to turn upon the right of the company to delegate the privilege to require toll, and the court, under all the circumstances shown, but with some hesitation, recognized the right. But it was shown that the bayou, although much obstructed by drifts, was at some stages of water to some extent navigable in small boats. The facts in that case differ widely from those in the case not now before the court. In the case referred to in 13 Louisiana Annual, the bayou was indirectly considered a public highway.

We concur with the judge of the district court, that the

plaintiffs' claim arises from an implied contract on the part of the defendant to compensate the plaintiffs for the use of their property. We also consider it unimportant what term or expression was used by the plaintiffs to denote the remuneration claimed for that use. They made no pretension to a franchise, or to be authorized by law to exact payment under the legal sense of "toll."

It is therefore ordered, adjudged, and decreed that the judgment of the district court be affirmed, with costs in both courts.

RIGHT OF PROPRIETOR TO EXCAVATE CHANNEL, way, or passage, and to exact compensation for the use thereof by the public: *Wadsworth v. Smith*, 26 Am. Dec. 525, and note 530; *Dwinel v. Barnard*, 48 Id. 507; Gould on Waters, sec. 142, citing with approval the principal case.

MILLER v. SCHNEIDER AND ZUBERBIER.

[19 LOUISIANA ANNUAL, 300.]

FACTOR CANNOT PLEDGE OR GIVE IN PAYMENT of his own debt property intrusted to him to be disposed of by sale for his principal.

THE opinion states the case.

Huntington, for the plaintiff and appellee.

Durant and Hornor, for the defendants and appellants.

By Court, TALIAFERRO, J. The plaintiff placed in the hands of Campbell and Bisland, retail grocers, to be sold by them on his account, five casks of brandy, for which they gave their receipt, which read as follows:—

"Received, New Orleans, April 18, 1865, from Mr. Charles D. Miller, five casks brandy, to be sold for three dollars per gallon or for more, if it can be realized, or subject to his order.

(Signed)

"CAMPBELL AND BISLAND,
pp. Stafford."

Campbell and Bisland, being indebted to the defendants, transferred the brandy to them.

The plaintiff brings this suit against the defendants to recover the brandy or its value, placed by him at \$637.50. He also prays judgment besides for legal interest from judicial demand.

The defendants put in a general denial. The plaintiff obtained judgment as prayed for, and the defendants have appealed.

The leading question in the case is, Did Campbell and Bisland's transfer of the property to Schneider and Zuberbier constitute a sale? Campbell and Bisland *quoad* this transaction were factors; and factors cannot pledge or give in payment of their own debts property intrusted to them to be disposed of for their principals: 1 La. Ann. 7.

There was evidently an effort to mystify the character of the act by which this lot of brandy passed from the custody of Campbell and Bisland into the possession of the defendants. An "ominous conjecture" is cast upon the fairness of the transaction. Campbell and Bisland owed Schneider and Zuberbier a thousand dollars. A clerk of Campbell and Bisland testified that when the brandy was sent to the defendants they were charged with it, and that afterwards he was instructed to enter it as a cash transaction. This was some time in June, 1865. In August afterwards, Campbell and Bisland went into insolvency. Another clerk of that house testified that the brandy was sold to defendants, and that he made out the bills; four casks having been sold at one time, and one cask at another time.

Massey, a witness and agent of the plaintiff, testified that on coming from Matamoras to New Orleans, he called on Campbell and Bisland, and from the tenor of the conversation he speaks of having with one of the clerks, it seems that the transfer of the brandy to the defendants was not communicated to him. He states that a few days afterwards he ascertained that the brandy had been sold to Schneider and Zuberbier, the defendants; that upon advice of counsel, he went immediately to one of the partners of that firm, and notified him not to pay Campbell and Bisland for the brandy, and received for answer that they had entered a credit on their books for it in favor of Campbell and Bisland. The witness states that this occurred between the 18th and 24th of June. Afterwards, on his return to New Orleans, he states that in an interview with the members of the firm (meaning the defendants), the one with whom he had previously communicated denied having told witness that the firm had credited Campbell and Bisland with the proceeds of the brandy, and then asserted that he had told witness they had paid Campbell and Bisland for it.

The bills of sale of the brandy are dated, the one on the 21st of June, and the other on the 23d of June.

A witness on behalf of the defendants swore that he saw the

bills paid in money; that they were paid by the book-keeper of Schneider and Zuberbier. The testimony of this witness, upon the whole, is of that character that it cannot be considered entirely reliable. One of the clerks of Campbell and Bisland, who testified, being recalled, said he believed the call of Massey, the agent, upon Campbell and Bisland on the subject of brandy caused them to give instructions to witness to make the entries on the books,—meaning clearly the entry in relation to passing the plaintiff's property over the defendants' "as a cash transaction."

A careful perusal of the evidence leaves no doubt with us that the transaction was a *dation en paiement*, and not a sale.

It is therefore ordered, adjudged, and decreed that the judgment of the district court be affirmed, with costs in both courts.

FACTOR CANNOT PLEDGE AS SECURITY for his individual debt goods of his principal consigned to him for sale: *Wright v. Solomon*, 79 Am. Dec. 196, and note 203.

BOWMAN v. GONEGAL.

[19 LOUISIANA ANNUAL, 828.]

CONTRACT TENDING TO LEND AID TO CONFEDERATE FORCES during the late Civil War is in direct violation of law, void, and cannot be enforced.

COURT WILL NOT LEND ITS AID to settle disputes relative to contracts repudiated by law. It will notice their illegality *ex officio*, and allow it to be suggested without any plea, and at any stage of the proceedings.

CONTRACT MUST HAVE LAWFUL PURPOSE; and if it have an unlawful cause, or if it is contrary to good morals or public policy, it is void.

THE opinion contains the facts.

Harrison and Hunton, for the plaintiff and appellant.

Sullivan, Billings, and Hughes, for the defendant and appellee.

By Court, ILSLEY, J. The present action grows out of the following agreement, entered into in Mississippi on the 27th of March, 1863, between the parties to this suit:—

"Whereas James Gonegal has this day entered into a contract with John J. Pettus, governor of the state of Mississippi, whereby the said Gonegal agreed to exchange fifty thousand sacks of salt for cotton; and whereas the said James H. Bowman and the said Gonegal have agreed to become partners in

the said contract; and whereas the said Bowman has advanced five thousand dollars in cash, to be used as capital in carrying the said contract into effect; now, in consideration of the premises, it is agreed that the said Bowman becomes an equal partner with the said Gonegal, with said John J. Pettus, governor as aforesaid, and all profits and losses arising from said contract are to be shared and divided equally between the said Bowman and the said Gonegal; and if any other goods of any kind are brought from New Orleans by the said Gonegal, the said Bowman and Gonegal are to become equal partners in the same, and share equally all profits and losses arising therefrom."

And the present suit is to recover back from the defendant the five thousand dollars in cash which was by the agreement to have been, but was not, used by the defendant to carry out the same.

The answer of the defendant admits the receipt of the nominal amount claimed under the agreement, but avers that the said sum was advanced by the plaintiff in the currency of the so-called Confederate States, and that he was prevented from using it on account of the unexpected situation of military affairs, and the change in the lines of the armies of the United States and so-called Confederate States; and he makes a tender of the amount in the same species of paper.

There was judgment in the court below for the defendant, and the plaintiff has appealed.

It is urged in this court by the appellee that the cause of the agreement was unlawful and against good morals and public order; but it is contended, on the other side, that the question of illegality in the consideration or object of a written contract is properly raised in only one of two modes: 1. Where the contract on its face admits of no other construction but an illegal one; 2. Where the contract is *prima facie* legal, and the defendant brings up the question by pleading and proving the illegality.

It has been repeatedly held by this court that it will not lend its aid to settle disputes relative to contracts reprobated by law. It will notice their illegality *ex officio*, and allow it to be suggested without any plea and at any stage of the proceedings: 2 Hennen's Digest, p. 1007, sec. 1. When it appears clearly that the agreement is for an illegal purpose, the court will dismiss the parties; but this is in the interest of public justice, and not of the party who seeks to profit by the acts of

his adversary, of which he has been the participant: *Denton v. Erwin*, 6 La. Ann. 317.

The question then is, whether the contracts between the governor of Mississippi and the defendant, and between the plaintiff and the defendant, on which the plaintiff's action is based, read in connection with the momentous events that were in progress at the time the contracts were executed, and which we notice judicially, are stamped with illegality; if so, the plaintiff's action must be dismissed. *Ubi dantis et acceptantis turpitudine versatur non posse repeto decimus.*

The object of the war then waged was on the part of one of the belligerents to sever the Union and to destroy the government of the United States, and any contract that tended to aid in the consummation of that object was in direct violation of law; and it was manifestly with the interest of promoting this object that the contracts referred to were entered into. They were agreements to supply enemies of the United States, whilst a state of war was existing, with a large quantity of salt and other goods of any kind, to be transported from New Orleans into the lines of the confederate (so called) army.

There is nothing redeeming on the face of the contract referred to. It is, in view of the then existing state of things, stamped with illegality, and nothing appears in the record to efface the taint with which it is imbued. It is not even shown that the plaintiff voluntarily abandoned the speculation.

In Broom's Legal Maxims, marginal paging 643, a case is put which seems to have a practical bearing on the position which the plaintiff occupies in this suit. It is this: "If A agrees to give B money for doing an illegal act, B cannot, although he do the act, recover the money by an action; yet if the money be paid, A cannot recover it back." So the premium paid on an illegal insurance, to recover a trading with an enemy, cannot be recovered back, though the underwriter cannot be compelled to make good the loss. And at page 645 the author thus sums up the law on the subject of illegality as affecting the standing of parties in court:—

"Upon the whole, then, it seems that the true test for determining whether or not the objection that plaintiff and defendant were *in pari delicto* can be sustained, is by considering whether the plaintiff can make out his case otherwise than through the medium and by the aid of the illegal transaction to which he himself was a party. For instance, A based an illegal wager with B, in which C agreed with A to take a share;

B lost the wager, and A, in expectation that B would pay the amount on a certain day, advanced to C his share of the winnings. B died insolvent before the day, and the bet was never paid; it was held that A could not recover from C the sum thus advanced." "The plaintiff," observed Gibbs, C. J., in *Simpson v. Bloss*, 7 Taunt. 246, 250, "says the payment was on a condition which has failed, but that condition was that B, who was concerned with the plaintiff and defendant in the illegal transaction, should make good his part by paying the whole bet to the plaintiff, and it is impossible to prove the failure of this condition without going into the illegal contract in which all the parties are equally concerned."

We think, therefore, that the plaintiff's claim is so mixed up with the illegal transactions, in which he and the defendant B were jointly engaged, that it cannot be established without going into proof of that transaction, and therefore cannot be enforced in a court of law.

In the case of *Armstrong v. Foley*, 11 Wheat. 258, as was said by this court in *Davis v. Holbrook*, 1 La. Ann. 178, the supreme court of the United States, through its organ, Chief Justice Marshall, lays it down as a general principle, which is perfectly settled, that no action can be maintained on a contract the consideration of which is wicked in itself, or prohibited by law; and the court, after declaring valid contracts unconnected with the original illegal act, although remotely caused by it, continues:—

"But if the importation is the result of a scheme between the plaintiff and defendant, or if the defendant has any interest in the goods, or if they are consigned to him with his privity, in order that he may protect them from the owner, a promise to repay any advances made under such understanding or agreement is utterly void": *Davis v. Holbrook*, 1 La. Ann. 178; *Gravier v. Carraby*, 17 Id. 131 [36 Am. Dec. 608].

A contract must have a lawful purpose; and if it have an unlawful cause, if it be contrary to good morals or public order, it can have no effect: Civil Code, arts. 1772, 1887, 1888; Pothier's Obligations, secs. 43 et seq.; *Bartle v. Coleman*, 4 Pet. 186.

Marcade, differing from many juriconsults, imbued with the doctrine of the Roman law, and taught by Pothier, claims that the law cannot be invoked to sustain an action based upon an illicit agreement. He says the articles of the French Code, identical with our own, will not permit one man to enrich

himself at the expense of another. And that article 1376, Code Napoleon, declares, in the most absolute manner, that whoever receives what is not due to him must restore it, without any distinction,—why or how the thing not due came into his hands. This obligation of restoration with us exists only in cases in which an illegal benefit arises from a lawful act.

Our courts will not condescend to decide controversies tainted with illegality or immorality, as *nemo allegans suam turpitudinem est audiendus*. They deem such agreements absolute nullities, and *quod nullius est confirmari nequit*.

It is therefore ordered, adjudged, and decreed that the plaintiff's action be dismissed, at the cost of the appellant.

COURT WILL NOT LEND ITS AID to settle disputes relative to invalid contracts. It will notice their illegality *ex officio*, and allow any plea at any stage of the proceedings: *Schmidt v. Barker*, 87 Am. Dec. 527, and note 532.

CONTRACT PROHIBITED BY LAW IS VOID: *Schmidt v. Barker*, 87 Am. Dec. 527. So is one which is against public policy: *Id.*, and note; *Ohio L. I. & T. Co. v. Merchants' I. & T. Co.*, 53 Id. 742.

MANDEVILLE AND MONTGOMERY v. BANK OF LOUISIANA.

[19 LOUISIANA ANNUAL, 392.]

ORDER OF MILITARY COMMANDER DURING LATE CIVIL WAR requiring a bank to pay to him certain moneys was equivalent to a garnishment of such moneys.

PAYMENT MADE BY BANK OF MONIES DUE ONE OF ITS DEPOSITORS, to a military commander, pursuant to his order, operates as a discharge of such bank, and such depositor cannot recover his deposit from the bank. The bank had no right to question the legality or propriety of the order, and no power to resist its enforcement.

THE opinion states the facts.

Morgan and New, for the plaintiffs and appellants.

Taylor, for the defendant and appellee.

By Court, LABAUVE, J. The plaintiffs claim of the defendant the sum of \$13,963.64, which they allege they had deposited in the Bank of Louisiana; that the same has never been paid to them, although amicably demanded.

The answer contains a general denial, and further, that in virtue of divers orders issued by Major-General Banks, and particularly one directed to Capt. T. M. McClure, to take pos-

session of the balances of persons who left the city on its occupation by the Union troops and have not returned, and hold them for the government, subject to any just claims that he made against them, the said sum of \$13,963.64 was withdrawn from the bank by said T. M. McClure, and that said bank is not responsible.

The district court gave judgment for defendant, and the plaintiffs appealed.

There is no dispute about the facts.

The judge *a quo*, in giving judgment, said: "This case being identical in every respect with that of *Dorr v. Bank of Louisiana*, No. 17,163, of the docket of this court, the reasons assigned for a judgment in that case must apply to this case."

We have carefully examined that opinion, which is found in the record, and we fully concur with our learned brother of the district court, and for the reasons by him assigned the judgment appealed from must be affirmed.

It is therefore ordered and decreed that the judgment appealed from be affirmed, with costs.

The opinion rendered in the case of *Dorr v. Bank of Louisiana*, and herein adopted, is as follows:—

"The plaintiff in this case, acting in the capacity of administrator of the succession of the late J. A. Simpson, claims from the Bank of Louisiana the sum of \$26,610, which he shows had been deposited in said bank to the credit of the deceased in the years 1861 and 1862.

"The defense set up against the demand is, that the bank is not liable to the plaintiff for the sum claimed, or for any part thereof, owing to the fact that under an order issued by the commanding general of this department on the 17th of August, 1863, the several banks and banking corporations in this city were required to pay over without delay to Col. S. B. Holabird, chief quartermaster, or to such officer of the quartermaster department as the colonel might designate, all moneys in their possession belonging to or standing upon their books to the credit of any person registered as an enemy of the United States, or engaged in any manner in the military, naval, or civil service of the so-called Confederate States, or who shall have been or may after the issuance of the order be convicted of rendering any aid or comfort to the enemies of the United States. And that in compliance with said order, the aforesaid sum of \$26,610, then standing in the books of the bank to the credit of the deceased, was paid over to T. M. Mc-

Clure, acting quartermaster, who was the officer delegated by Colonel Holabird to receive the moneys referred to in the commanding general's order, and who was at the same time one of the commissioners in charge of the effects of the bank as liquidators under military appointment.

"The facts of the case are quite simple; they are such as represented by the pleadings, with this additional evidence: that J. A. Simpson, who died in December, 1863, was, at the time of his death, between sixty-three and sixty-seven years of age, and a resident of the state of Alabama, to which he had moved in the early part of 1863, from the state of Florida; that up to the day of his death he was not employed in the armies of the so-called Confederate States; that he occupied no civil position whatever under the confederate government, and that he was not known to be otherwise than a loyal citizen of the United States.

"Under this state of facts, the question to be decided is this: Can the bank be held liable to the plaintiff, as the administrator of Simpson's estate, for the moneys which this latter had to his credit in the books of the bank, notwithstanding the fact that the bank has already paid over these moneys to the acting quartermaster, McClure, under the military order?

"On the part of the plaintiff, it is contended that when the money was paid to McClure, the relation in which Simpson and the bank stood towards each other was not that of depositor and depositary, but simply that of creditor and debtor; that the payment transferred no property of Simpson to McClure, but turned over to him the property of the bank; and hence, it is argued that the bank did not by the fact of the payment cease to be the debtor of the plaintiff, but still owes him, or rather his estate, the amount claimed, notwithstanding the payment.

"It is evident that the real position in which the contending parties stood towards each other when the payment was made to McClure was that of creditor and debtor. Upon this question there can be no reasonable doubt. The deposit of Simpson with the bank was not a special but an ordinary deposit; the bank had, then, the right to use his money; it became its own property, and the bank became, at the moment of the deposit, the debtor of Simpson to the extent of the sum deposited. That doctrine is recognized in the cases of *Matthews v. Creditors*, 10 La. Ann. 323, and *Simons v. Bean*,

10 Id. 346; but admitting the fact that Simpson was the creditor of the bank when McClure required of the latter a compliance with the order of the commanding general, I am at a loss to conceive by what principle of law or of equity Simpson could be justified in claiming to be still a creditor of the bank, notwithstanding the payment to McClure. The order of the major-general, requiring the banks and banking corporations in this city to pay over to the chief quartermaster all moneys in their books standing to the credit of the persons referred to in the order, was in all respects equivalent to a garnishment in the hands of the banks of all claims for money out of deposits which the parties named in the order held against the banks and banking corporations, and all payments made under the order was compulsory, and must necessarily operate a discharge in favor of the banks, as would a payment made by a garnishee to a plaintiff in a regular garnishment process. What was seized upon, confiscated or sequestered, and taken possession of by McClure under the major-general's order, was not the identical moneys which had originally been deposited by Simpson with the bank, and which, at the very moment of the deposit, became the property of the bank, nor was it the property, effects, or moneys of the bank, but the property of Simpson himself; that is, his claim against the bank for moneys deposited.

"Hence it follows that his claim being the thing confiscated and taken by McClure from the bank, all his rights under it passed over to McClure under the order of the major-general, and the payment made to McClure must necessarily have released the bank.

"But it is insisted that the order issued by the commanding general on the 17th of August, 1863, was unauthorized by law; that it did not reach Simpson, because he was not in the category of those persons contemplated by the major-general, which is a fact that could have easily been shown by the bank; that for these reasons the bank should have resisted the enforcement of the order, and that its neglect to do so has worked upon the plaintiff an injury for which the bank should be held responsible.

"So far as the legality of the order is concerned is of no consequence here, for the bank had no right to question it; no more so than it had the right to put at issue its propriety: *Foster v. Milsoe*, 2 Pet. 253; but even if it did possess that right, it certainly had not the power to enforce the right, and

it cannot, therefore, be accused of neglect for not doing what it had no power or means to do. Nor was it the province of the bank, or within its power, to determine whether or not the plaintiff was affected by the order; the determination of that question was evidently left with the military, for they alone had the means of ascertaining the *status* of every one. But be that as it may, and conceding that the bank may be accused of gross negligence by the plaintiff, that negligence would perhaps authorize a judgment against it in a suit for damages, but certainly not in this suit, where no damages are claimed.

"But, furthermore, another circumstance in the case strongly militates in favor of the defendant. It is shown that when McClure received the amount of money standing to the credit of Simpson in the books of the bank, the latter was not under the administration of the directors. A commission of liquidators, of whom McClure was one, had taken possession of it; these had been appointed by the military, consequently their act in paying over the money to McClure was not, properly speaking, the act of the bank, but was the act of the military, for which it is neither just nor equitable that the bank should be made to suffer."

CLAPP & Co. v. PHELPS & Co. GRIFFEN & Co., INTERVENORS.

[19 LOUISIANA ANNUAL, 461.]

INTERVENOR MAY JOIN EITHER PLAINTIFF OR DEFENDANT in the principal action, or he may oppose both when his interest requires it; but he cannot, without the consent of plaintiff, be substituted in the place and stead of the defendant.

INTERVENOR STANDS IN CHARACTER OF PLAINTIFF before the court, as to the nature of his title and the object of his demand, and is governed in his pleadings by the rules of practice which apply to plaintiffs in principal demands.

WHEN DEFENDANT IN HIS ANSWER neither denies the legal right of the plaintiff to recover, nor the truth of the allegations in his petition, they are taken to be confessed, and the plaintiff in such case need not adduce proof in support of his claim or demand.

INTERVENOR CANNOT BOND PROPERTY in the custody of the sheriff under sequestration, as the right to bond property sequestered is given only to the parties to the action; first to defendant, and if he neglects to exercise the privilege within ten days after the seizure, then to the plaintiff.

ORDER OF CLERK OF COURT authorizing intervenor to bond property in the custody of the sheriff under sequestration is void.

THE opinion states the case.

AM. DEC. VOL. XCII—85

T. T. and A. D. Land, for the plaintiffs.

Hicks and Hall, for the defendants.

By Court, ILSLEY, J. From a judgment rendered in favor of the plaintiffs for the cotton claimed in their petition, the intervenors, Griffen & Co., have appealed, and in this court have filed an assignment of errors on which they rely for a reversal of the judgment.

We shall consider the errors assigned in the order of assignment.

1. That the court below erred in refusing to permit the intervenors to appear and plead as defendants in the action, in the place and stead of the defendants, Phelps & Co.

I. An intervenor may join either plaintiff or defendant in the principal action, or he may oppose both when his interest requires it, but he cannot, without the consent of the plaintiff, substitute himself in the place and stead of the defendant: C. P. 389, 390, and amendment. If the law were otherwise, the legal rights of a plaintiff might be entirely defeated. A demand in intervention is but an accessory to a main action: *Todd v. Spouce*, 14 La. Ann. 427.

2. That the court erred in dismissing the petition of intervention on an exception filed by the plaintiff.

II. The exception was to the petition, on the ground that it did not disclose the origin and nature of the pretended title of the intervenors, the name and residence of the vendor of the intervenors, nor the place, price, or any other circumstance of a contract of sale or other mode of acquiring title to property. The plaintiffs, in their exception, prayed the court to order the intervenors to amend their petition in the particulars or circumstances mentioned, and in default, to dismiss it, on the ground of vagueness and uncertainty in its allegations. The court sustained the exception and granted leave to the intervenors to amend their petition, but they refused to amend, and the petition was dismissed as prayed for in the exception. An intervenor stands in the character of plaintiff before the court as to the nature of his title and the object of his demand, and is governed in his pleadings by the rules of practice which apply to plaintiffs in principal demands: C. P. 172; Hennen's Digest, verbo Pleadings, v. (a) (3).

3. That the court erred in rendering judgment in favor of plaintiffs, upon the answers filed by defendants, Phelps & Co.

III. The answer of the defendants was a disclaimer of any title or ownership of the cotton on their part, and as a disclaimer of title and ownership, the answer neither denied nor put at issue any of the allegations of the plaintiff's petition.

The object of pleading is to present an issue either of law or of fact, on which the court can pass a judgment between the parties to the suit, and when a defendant, in his answer filed in the cause, neither denies the legal right of the plaintiff to recover, nor the truth of the allegations of his petition, they are taken by the court to be confessed: *Nennier v. Coist*, 5 Mart. (La.) 56; *Akin v. Bedford*, 4 La., N. S., 615.

The plaintiff, in such a case, is dispensed from the necessity of adducing or administering proof in support of his claim or demand.

4. That the court erred in refusing to set aside the judgment dismissing the petition of intervention; and also in refusing to set aside the judgment rendered in favor of the plaintiffs on the answer filed by the defendants.

IV. For the reasons stated in considering second and third assignments of errors, the court below did not err in refusing to disturb the judgment; and,

5. That the court erred in permitting the plaintiff to bond the cotton after the intervenors had obtained an order from the clerk of the court authorizing them to bond it.

V. The intervenors had no right to bond the cotton under the provisions of the law, and in no case could they be permitted to do so when in the custody of the sheriff under a sequestration, in the absence of a decree or order of the judge rendered contradictorily between the plaintiffs and the intervenors.

The right to bond property sequestered is only given by the law to the parties to the action: first, to the defendant; and if he neglects to exercise the privilege within ten days after the seizure, then to the plaintiff: C. P. 279, and amendments. The order of the clerk authorizing the intervenors to bond the cotton was without warrant or authority of law, and was therefore without any legal effect; and it was the duty of the district judge to disregard the action of the clerk, and to grant an order to bond in favor of the plaintiffs, the parties legally entitled to it.

It is therefore ordered, adjudged, and decreed that the judgment of the lower court be affirmed, with costs.

INTERVENORS, RIGHTS OF, AND WHAT INTEREST must have in matter in litigation: *Horn v. Volcano Water Co.*, 73 Am. Dec. 569, and note 573; *New Orleans etc. Co. v. Beard*, 79 Id. 582, and note 586.

AVERMENTS IN COMPLAINT NOT DENIED are taken to be true: *Buckout v. Swift*, 87 Am. Dec. 90, and note 94.

NORTON v. DAWSON AND BOGAN.

[19 LOUISIANA ANNUAL, 464.]

NOTE, CONSIDERATION FOR WHICH IS CONFEDERATE MONEY, is an immoral and reprobated contract, which cannot be enforced.

CONFEDERATE CURRENCY WAS CREATED TO ASSIST REBELLION against the government, and the giving circulation to it was immoral and against public policy.

THE opinion contains the facts.

Lewis and Hunter, for the plaintiff.

Ryan and White, for the defendants.

By Court, LABAUVE, J. This suit is brought on a promissory note for one thousand dollars, the consideration of which is proved to be treasury notes of the so-called Confederate States.

Judgment was rendered in favor of plaintiff for five hundred dollars in gold, and the defendants appealed.

Parol evidence was properly admitted to prove the consideration of the note, although excepted to, and to show that it was confederate money. This kind of currency was created to assist the rebellion against the government, and the giving circulation to it was immoral and against public policy; and it was well settled that in immoral and reprobated contracts, parol evidence is admitted to vary and contradict written contracts. We cannot enforce this obligation, according to many decisions of this court: *Slidell v. Pritchard*, 5 Rob. (La.) 101; *Mouton v. Noble*, 1 La. Ann. 192; *Hertz v. Wilder*, 10 Id. 199; *Fox v. New Orleans*, 12 Id. 154 [68 Am. Dec. 766].

It is therefore ordered that the judgment be reversed, and the suit dismissed, at the costs of the plaintiff, in both courts.

CASES
IN THE
SUPREME JUDICIAL COURT
OF
MAINE.

CALEF v. CALEF.

[54 MAINE, 305.]

SUPREME COURT OF MAINE CANNOT GRANT DIVORCE to parties who were married in another state and never resided in Maine, but who, soon after the marriage, entered the state on a visit and spent four days there, living together as husband and wife; such visit is not a cohabitation within the act regulating divorces.

LIBEL for divorce. The opinion contains the facts.

Davis and Drummond, for the libelant.

By Court, **APPLETON, C. J.** This is a libel for a divorce, the libelee being a resident of Massachusetts.

By the Revised Statutes of 1857, c. 60, sec. 2, "a divorce from the bonds of matrimony may be decreed by any justice of the supreme judicial court, at any term thereof, in the county where either party resides at the time of filing the libel, when, in the exercise of a sound discretion, he deems it reasonable and proper, conducive to domestic harmony, and consistent with the peace and morality of society, if the parties were married in this state, or cohabited here after marriage."

The parties to this libel were married in Rhode Island on the 18th of June, 1860. They never resided together in Maine, but soon after their marriage they came into this state on a visit, and spent four days here, living together as husband and wife.

The question presented is, whether visiting is cohabiting

within the act under and by virtue of which a divorce is claimed.

The primary meaning of the word "cohabit" is to dwell with some one,—not merely to visit or see them. It includes more than that. Such, too, is the meaning as determined by its derivation, being compounded of *con*, with, and *habito*, to dwell. Worcester defines the word thus: "To dwell with another in the same place." Webster's definition is: "To dwell with; to inhabit or reside in the same place or country; to dwell or live together, usually or often applied to persons not legally married." Richardson gives the meaning thus: "To have, hold, or keep a dwelling or abiding place; to dwell or abide together with." Bouvier defines cohabitation as "living together." The law presumes the husband to cohabit with his wife, even after a voluntary separation has taken place between them. It is otherwise when there has been a sentence of separation.

In England, in the ecclesiastical courts, matrimonial intercourse is distinguished from matrimonial cohabitation. The case of *Orme v. Orme*, 2 Add. Ecc. 382, was a suit brought by a wife against the husband for restitution of conjugal rights. It was there held that the court can only interfere in the way of restitution when matrimonial cohabitation is suspended; that the single duty it can enforce by a decree, in a suit of this nature, is that of married parties living together; that it cannot attempt to enforce anything in addition to this. Hence it is incompetent for the wife to sue the husband, or the husband the wife, "for restitution of conjugal rights" pending cohabitation. So Sir William Scott, in *Foster v. Foster*, 1 Hagg. Ecc. 144, adopts the remark of Dr. Harris, that "the duty of matrimonial intercourse cannot be compelled by this court, though matrimonial cohabitation may." As to the meaning of the word "cohabitation," see 1 Bishop on Marriage and Divorce, sec. 777, note 1, where the question is fully and ably discussed.

We do not think the legislature intended to confer jurisdiction over every traveler who was journeying in the state, or on a mere visit to a friend. They intended the section to apply to those who were living together in one house as their home,—to those who were dwelling together in some place in the state, and not to foreigners, who were temporarily in the state on a visit of friendship or pleasure, and not residing and having no intention to reside in this state.

Libel dismissed.

KENT, WALTON. DICKERSON, BARROWS, and TAPLEY, JJ., concurred.

JURISDICTION TO GRANT DIVORCE, where one or both parties are non-residents: *Hubbell v. Hubbell*, 62 Am. Dec. 702, and note; *Hanover v. Turner*, 7 Id. 203.

THE PRINCIPAL CASE IS FOLLOWED WITH APPROVAL in *Simonds v. Simonds*, 103 Mass. 572; *Ross v. Ross*, 103 Id. 507; *Loud v. Loud*, 129 Id. 17.

FENDERSON v. OWEN.

[54 MAINE, 372.]

WHEN IT IS NECESSARY TO DETERMINE DATE OF PAPER offered in evidence, and the month is so inartificially written that upon inspection the presiding judge is unable to determine whether it should be read June or January, extraneous evidence is admissible to show the true date, and the question is a proper one for the jury.

WHETHER CERTAIN CHARACTERS WERE INTENDED to represent one word or another, is a question of fact to be determined by the jury.

ASSUMPSIT on a promissory note. The opinion states the facts.

Vinton and Dennett, for the plaintiff.

Strout and Gage, for the defendant.

By Court, WALTON, J. When it is necessary to determine the date of a paper offered in evidence, and the name of the month is so inartificially written that upon inspection the presiding judge is unable to determine whether it should be read June or January, extraneous evidence is admissible to show the true date, and the question is a proper one to be submitted to the jury. So held in *Armstrong v. Burrows*, 6 Watts, 266, where the question was fully considered.

The same word was in dispute in that case as in this, namely, whether the name of the month in the date of a paper should be read June or January; and the court held that the question was for the jury, and not the court.

This is so upon principle as well as authority. To the court belongs the duty of declaring the law, but it is the province of the jury to weigh evidence and determine facts. Whether certain characters were intended to represent one word or another, is not a question of law; it is a question of fact; and when the fact is in dispute, and to ascertain the truth it is necessary to resort to extraneous evidence (circum-

stantial and conflicting it may be), its ascertainment would seem upon principle to belong to the jury, and not to the court.

It is undoubtedly the duty of the court to interpret written contracts. But reading and interpreting are very different matters. A blind man may interpret, but he cannot read. The language must be ascertained before the work of interpretation commences. It does not follow that because it is the duty of the judge to interpret it is therefore his duty to read the paper in controversy.

Exceptions overruled. Judgment on the verdict.

APPLETON, C. J., KENT, BARROWS, DANFORTH, and TAPLEY, JJ., concurred.

PAROL EVIDENCE IS ADMISSIBLE to explain ambiguities or meaning of words in writings: *Hartwell v. Camman*, 64 Am. Dec. 448; *Henderson v. Hackney*, 68 Id. 529; *Bowen v. Slaughter*, 71 Id. 135; *Walker v. Wells*, 71 Id. 164, and notes to these cases.

THE PRINCIPAL CASE IS CITED in *State v. Patterson*, 68 Me. 474-477, to the point that, whenever a paper can be understood from its own words, its interpretation is a question for the court, and it is not necessary to submit to the jury to ascertain what the word "inbited" in an indictment was intended for, when no extraneous facts were offered in evidence for that purpose.

WESTON v. GRAND TRUNK RAILWAY COMPANY.

[64 MAINE, 576.]

MEASURE OF DAMAGES AGAINST CARRIER FOR DELAY IN DELIVERING GOODS. — When a carrier contracts to deliver goods, and by his neglect they are not delivered at the time and place when and where they should have been delivered, and at the time of their delivery there is a diminution of their market value, the carrier is liable for the loss thus arising. The difference in value at the time of delivery and when the goods should have been delivered constitutes the measure of damages, and is a material element proper for the consideration of the jury in assessing the damages.

CASE to recover damages. The opinion states the facts.

Davis and Drummond, for the plaintiffs.

P. Barnes, for the defendants.

By Court, APPLETON, C. J. The defendants are common carriers. The jury, under instructions to which no exceptions have been taken, have found that there was unreasonable and

unnecessary delay on the part of the defendants in the transportation of the plaintiff's flour, and that he has sustained damage by reason of such delay.

The only question presented in argument relates to the true rule of damage. The defendants deny that they are liable for more than interest on the purchase-money during the delay. The court instructed the jury that they might take into consideration the decline in the market value of flour between the time when it actually arrived at its place of destination and when in the exercise of proper diligence on the part of the defendants it might have so arrived. By this ruling, the defendants were held to remunerate the plaintiff for the decline in the price of flour and the loss arising from their neglect of duty.

In case of the non-performance of a contract of sale, the measure of damage is the value of the article sold at the time and place of delivery, if the price has been paid; and the difference between that and the contract price, if not paid.

If a common carrier contracts to deliver an article and it is lost, he is liable for its value at its place of destination at the time of the loss: *Blumenthal v. Brainerd*, 38 Vt. 403; 2 Redfield on Railroads, sec. 151; *Lawrent v. Vaughn*, 30 Vt. 90.

When a carrier contracts to deliver an article, and by his neglect it is not delivered at the time and place when and where in the due performance of the contract it should have been delivered, and at the time of its actual delivery there is a diminution of its market value, the loss thus arising is held to be the necessary consequence of the carrier's negligence, for which he should be made liable. The difference between the value at the time of the actual delivery and that when in the performance of his contract it should have been delivered seems to be recognized as the true measure of damages. "In cases of this kind," observes Thomas, J., in *Ingledeu v. Northern Railroad*, 7 Gray, 88, "the rule of damages seems to be the diminution in value of the goods as articles of merchandise at the time of their arrival by reason of the delay. What were the goods worth less at the time of their arrival than they would have been if they had come without delay, or in the usual course of transportation?" In *King v. Woodbridge*, 34 Vt. 566, the plaintiff in a case like the present was held entitled to recover as damages the difference between what he was obliged to sell the property at when it did arrive and what he would have received at the time it should have ar-

rived if the defendant had performed his contract. These views seem to have been adopted in *Henry v. Sangamon & M. R. R. Co.*, 14 Ill. 156; *Sisson v. Cleveland and Toledo R. R. Co.*, 14 Mich. 489; and in *Galena & C. R. R. Co. v. Rae*, 18 Ill. 488 [68 Am. Dec. 574].

In *Wilson v. Lancashire R'y Co.*, 99 Eng. Com. L. 632, Williams, J., says: "Two questions of law were raised during the argument on the part of the defendants. The first was, whether in a case like this, of an action against a common carrier for negligence in not delivering goods intrusted to him within a reasonable time, the consignee has a right to claim in the shape of damages the profit he would have made upon the sale of them if they had been delivered in proper time. We are all of opinion he is not. Then comes the other question, whether he is entitled to recover the difference between the value of the goods to him if they had been delivered in proper time and their value at the time when they were actually delivered. I am of opinion that the consignee is entitled to recover such difference in value." "It is admitted," remarks Byles, J., in the same case, "that deterioration in quality is to be taken in account in estimating the damage the plaintiff has sustained; it is admitted, also, that loss or diminution in the quantity is to be taken into account; and I do not see why a loss in the exchangeable value of the goods should not also be taken into account." So in *Smith v. New Haven & N. H. R. R. Co.*, 12 Allen, 531, the damages resulting from a wrongful delay on the part of the carrier were held to be the difference in the market value between the time when the goods ought to have arrived and when they did arrive at the terminus of the road.

Upon a careful examination, we think the weight of authority is decidedly adverse to the rule as claimed by the learned counsel for the defendants, and that the decline in the market value of an article between the time when it actually arrived at its place of destination and when in the exercise of proper diligence on the part of the carrier it might have arrived there, was a material element proper for the consideration of the jury in ascertaining the actual damages sustained by the plaintiff; and such was the ruling of the presiding justice.

Exceptions overruled.

KENT, WALTON, DANFORTH, and TAPLEY, JJ., concurred.

BARROWS, J. I concur in overruling the exceptions, but it seems to me that it is laying down the rule of damages too broadly to say that the damages in all such cases should be the difference in the market value between the time when the goods ought to have arrived and when they did arrive. There may be cases where the plaintiff would not really suffer to that extent by reason of the non-delivery. Plainly he would not, if he had on hand more than he could sell on the falling market.

MEASURE OF DAMAGES AGAINST CARRIER for delay in delivering goods: *Nettes v. South Carolina R. R. Co.*, 62 Am. Dec. 409, and note 411; *Galena etc. R. R. Co. v. Rae*, 68 Id. 574; *Ohio etc. R. R. Co. v. Dunbar*, 71 Id. 291, and note 296.

WHERE DELIVERY OF GOODS IS NEGLIGENTLY DELAYED, the carrier is liable for the diminution in their market value occurring during their delay: *Grindle v. Eastern Express Co.*, 67 Me. 322; *Boston and Maine R. R. Co. v. Warrior Mower Co.*, 76 Id. 260, both citing the principal case.

EVELETH v. BLOSSOM.

[54 MAINE, 447.]

REPLEVIN. — **OWNER OF GOODS** carried by an express company may, after tendering the sum legally due for transportation, and demand and refusal, maintain replevin for the goods against the agent of the company who has them in custody.

REPLEVIN LIES UNDER MAINE STATUTE for a wrongful detention as well as a wrongful taking, and either is sufficient to maintain the action.

THE opinion states the case.

J. Baker, for the plaintiff.

S. and J. W. May, for the defendant.

By Court, **TAPLEY, J.** This is an action of replevin brought by the plaintiff to recover two trunks and a chest, with their contents, committed originally to Turner's Express for transportation from St. Johns, New Brunswick, to Monmouth, Maine. After about one year's delay, the plaintiff found her goods in the possession of the defendant, who claimed to hold them as the agent of one Williams, depot-master and express agent of the Eastern Express Company at Monmouth; as a condition of their delivery, he demanded the sum of \$41.25, which he alleged was due the Eastern Express Company for transportation and money paid on them.

The plaintiff denied the right of the carriers of her goods to charge such sum, and tendered the sum of \$18.50 for their release, which was refused. The plaintiff, being unable to obtain her goods without the payment of the sum claimed, commenced this action, and the evidence in the case is now submitted to the court, with power to draw such inferences as a jury might, and to render such judgment in the case as the law and the evidence require.

Neither the property in the goods, the refusal to deliver, nor their detention is denied, but it is claimed that the Eastern Express Company had a lien upon the plaintiff's goods for the sum of \$41.25, and evidence has been adduced for the purpose of proving this allegation.

Upon a careful examination, we are of opinion that the goods were not subject to a lien for that amount, and that the sum tendered was sufficient to cover all charges legally existing against the goods; and that the plaintiff, upon the tender of the sum of \$18.50, was entitled to the possession of her goods.

It was contended by the learned counsel for the defense, that however this may be, that, inasmuch as the defendant was acting as the agent of the express company's agent, and only authorized by them to deliver upon the payment of \$41.25, he cannot be held liable in this action, for he would make himself liable to the express company if he delivered upon the payment of a less sum.

While it is not admitted that such would have been the effect of a delivery to the plaintiff of her property upon the tender of all that was due thereon, yet if such had been the effect of the defendant's contract with the express company, it could not authorize him to withhold the plaintiff's goods from her after she was legally entitled to their possession.

Whatever rights of holding the defendant had, he claims from, by, and under the Eastern Express Company. If they could not legally hold the goods after tender of the actual amount due by the plaintiff, certainly their agent could not. They could confer no greater powers upon their agent than they possessed themselves. The agent cannot withhold where the principal cannot. These principles are nowise in conflict with the cases cited by the counsel for defendants.

The authority referred to in Hilliard on Torts, note to page 583 of volume 2, is correctly quoted by the counsel as follows: "An action cannot be sustained against a mere depository of

money unless his situation has been changed, either by a wrongful refusal to pay the money upon proper request, or by a wrongful appropriation of it."

In other words, the depositary, having received the money rightfully, is not liable to an action until he does something wrong, which may be done by "refusal to pay the money upon proper request." So in the case at bar, the goods having come to the possession of the defendant rightfully, no action could be maintained against him until he had done something wrongful concerning them. They were under his control. He had the power to deliver. He was the keeper. If the amount demanded by him had been paid, he would have delivered. That amount not having been paid or tendered, he chose to retain them. This was wrongful as to this plaintiff. It was the retention of her goods after she was entitled to the possession. Whether wrongful or rightful, as between the agent and his principal, will depend upon their contract, and however it may be, it cannot affect the plaintiff's rights.

The cases cited relative to conversion are in perfect harmony with these views. In the case of *Fernald v. Chase*, 37 Me. 289, cited by defendant's counsel, Shepley, C. J., says: "To make out a conversion, there must be proof of a wrongful possession, or of the exercise of a dominion over it in exclusion of the owner's rights, or of an unauthorized and injurious use, or of a wrongful detention after demand."

Applying this rule to the case at bar, we find the defendant exercising a dominion over the plaintiff's property in exclusion and defiance of her rights. He tells her, Pay me \$41.25 and I will deliver you your property, otherwise I will retain it. We find him detaining after tender and demand. Now, it can make no difference with the plaintiff that the defendant thus exercises dominion over the plaintiff's property, and thus detains it by virtue of a contract and engagement with the express company so to do. It is as wrongful to her, and as injurious to her, as if there was no such engagement.

His contract is of avail between him and them, and not between him and persons not parties to it.

Replevin lies by our statute for a wrongful detention as well as a wrongful taking, and either is sufficient to maintain the action. No other tortious act need be proved but the wrongful detention: *Seaver v. Dingley*, 4 Me. 306; R. S., c. 96, sec. 8. Such were the decisions in Massachusetts: *Badger v.*

Phinney, 15 Mass. 359 [8 Am. Dec. 105]; *Baker v. Fales*, 16 Id. 147; *Marston v. Baldwin*, 17 Id. 606.

The case of *Woodward v. Grand Trunk R'y Co.*, 46 N. H. 524, cited by the counsel from the Law Register for April, 1867, simply decides that at common law to maintain replevin there must be an unlawful taking, with the single exception of a distress of cattle damage-feasant, or of chattels for rent in arrear. The doctrine of the common law is adhered to in New Hampshire, except as modified by statute in relation to beasts impounded, and goods attached in mesne process: N. H. Comp. Stats. 520.

Therefore, when the goods came into the possession of defendant lawfully, detention would not sustain the action. It is otherwise in this state, the common-law rule being modified by statute so as to include unlawful detention as a cause.

The defendant having wrongfully detained the plaintiff's goods after the tender and demand, she is entitled to recover. Upon the proofs here adduced, she will be entitled to nominal damages only.

Judgment for the plaintiff, and for one dollar as damages.

APPLETON, C. J., CUTTING, WALTON, DICKERSON, and BARROWS, JJ., concurred.

REPLEVIN LIES FOR GOODS OR CHATTELS WRONGFULLY DETAINED; an unlawful taking is not necessary: *Badger v. Phinney*, 8 Am. Dec. 105; *Dennison v. Blackburn*, 60 Id. 160; *Catterlin v. Mitchell*, 89 Id. 501.

LEWIS v. CHADBOURNE.

[54 MAINE, 434.]

SAILORS IN MACKEREL VOYAGE, in the absence of a contract to the contrary, are neither partners in nor part owners of the fish caught; they therefore have no attachable interest in the catch of the voyage.

CASE. The opinion contains the facts.

Ingalls and Smith, for the plaintiffs.

Wales Hubbard, for the defendant.

By Court, APPLETON, C. J. The plaintiffs, having sued out a writ against one Dexter Lewis, caused an attachment to be made by Thomas Boyd, a deputy of the defendant, of the debtor's interest or share "in a fare of mackerel caught in the schooner *Astoria*." Judgment having been rendered in that

suit, the execution thereupon issuing was placed in the hands of William Cunningham, a deputy sheriff of Lincoln County, by whom a demand was seasonably made upon the officer serving the original writ for the property thereon attached. Nothing having been surrendered upon this demand, this action is brought against the defendant for the default of his deputy in not keeping the property attached, so that it could be given up to the officer having the execution, to be by him seized and sold according to law.

If Dexter Lewis had been a sailor for specific wages payable in money, it is obvious enough that he would have had no attachable interest in the mackerel caught upon the voyage.

The general custom, it seems, is for sailors in the mackerel fishery to go on shares. The owners of the vessel have the mackerel, which they or their agents sell, and after deducting the advances to and the outfits of each, the balance of the share remaining is paid in money. If such was not the bargain, the evidence fails to disclose any interest belonging to Dexter Lewis which could be attached on the writ or sold on the execution. If such was the bargain, the inquiry arises, What, if any, interest in "the fare" was attached?

In whaling voyages, the sailors usually have a certain lay or share in the proceeds, as wages. Their compensation is therefore contingent, and dependent upon their success. But they are never regarded as partners, though they may participate in the profits of the voyage: *Reed v. Canfield*, 1 Sum. 195; *Mine v. Glennie*, 4 Maule & S. 240; *Coffin v. Jenkins*, 3 Sum. 112. Neither are they tenants in common of what may be caught: *Bishop v. Shepherd*, 23 Pick. 492; *The Crusader*, Ware, 448. Nor can officers and crew join with the owners in a suit for the recovery of the proceeds of the voyage: *Grozier v. Atwood*, 4 Pick. 234.

"The men, by their original contract, had no right to their proportion of the oil, and to take it to themselves; but the whole was to be sold, and they were to have their share of the proceeds": *Barney v. Coffin*, 3 Pick. 123. The owners of the vessel and the projectors of the voyage are the owners of the product of the voyage: *Baxter v. Rodman*, 3 Id. 439. "The crew's claim," observes Sprague, J., in *Taber v. Tenney*, Sprague, 322, "is to a share of the proceeds of the voyage; and they have no property in the oil itself. The contract is, that out of the proceeds, when realized, they shall be paid according to their lays."

It is clear that, in voyages of this description, the sailor has no property in the products of the voyage which can be specifically attached. An officer has, therefore, no right to attach; for, as is determined in the case last cited, "a seaman in the whale fishery has no property in the oil or bone taken": *Rice v. Austin*, 17 Mass. 206.

Now, if a similar custom exists in the mackerel fishery, similar results must ensue. Nobody ever supposed that seamen in the mackerel fishery were liable for the debts of the ship or the outfits of the voyage. They are neither partners in nor part owners of the fish caught. The owners, in the one species of fishery as well as the other, furnish all the stores, provisions, and outfits; and the crew are paid according to the success of the enterprise. "I think," observes Sprague, J., in *Knight v. Parsons*, Sprague, 279, "that, under this contract, the crew are rather to be deemed hired seamen than partners or joint contractors. It has long been decided that, in the whale fishery, the crew have no specific property in the oil, but only a right to the proceeds of the oil; and the contract, in this case, seems to give the owners the right to sell the fish, and the crew have only a pecuniary claim, calculated upon the amount of fish caught."

It is clear, therefore, that the plaintiffs acquired no rights by the supposed attachment of Boyd, and that consequently this action cannot be maintained.

It seems, in whaling voyages, that if an officer or seaman prefers to have his share in oil specifically, he will be allowed to do so; "but even in this case," remarks Shaw, C. J., in *Bishop v. Shepherd*, 23 Pick. 492, "it is clear that he has no property in the oil until separation and delivery." But before a seaman would have a right to his specific share of such oil, he should tender the amount due the owners for his proportion of the outfit and advances. Until this was done, he could neither equitably nor legally claim a division: *Wait v. Gibbs*, 7 Id. 145.

But in the present case, there has been no tender of the judgment debtor's proportion of the outfit and advances, nor any division of the mackerel, nor any proof that they were agreed to be specifically divided, nor that it was the wish of any one that they should be so divided.

Plaintiffs nonsuit.

CUTTING, KENT, WALTON, BARBOWS, and DANFORTH, JJ., concurred.

ALTHOUGH AMOUNT WHICH SEAMAN IS TO RECEIVE for his labor is made to depend upon the amount of fish caught, still he is not on that account a partner in the enterprise, and therefore need not join any of the crew with him in an action to recover his share of the proceeds: *Holden v. French*, 68 Md. 243, citing the principal case.

LANCEY v. CLIFFORD.

[54 MAINE, 437.]

NON-NAVIGABLE STREAM CAPABLE OF BEING USED for floating logs, lumber, and rafts is subject to the public use as a highway, though it is private property; but the public use must be exercised in a reasonable manner, as one person has an equal right with another to its enjoyment. What constitutes a reasonable use depends upon the particular circumstances of each case.

OWNER OF SOIL OVER WHICH FLOATABLE BUT NON-NAVIGABLE stream passes may build a dam across it, and erect a mill thereon, provided he furnishes a convenient and suitable sluice or passage-way for the public by or through his dam; and it is not necessary that the erection of the mill should precede the dam, but if the latter was built at a place suitable for a mill site, and for the purpose of raising water to propel a mill to be subsequently erected, this is sufficient.

THE opinion contains the facts.

A. Libbey, for the plaintiff.

J. S. Abbott, for the defendants.

By Court, *DICKERSON, J.* Case for erecting a dam across the Sebasticook River, in the town of Benton, whereby the plaintiff was prevented from using the same as a highway for floating his logs.

After the plaintiff had closed his testimony, the defendants offered to prove certain propositions, but the presiding judge ruled that the evidence offered would not constitute a defense to the action; and thereupon a default was entered, and the defendants excepted. The exceptions raise the single question of law, whether the evidence offered would be a valid defense to the action.

A stream which, in its natural condition, is capable of being used for floating logs, lumber, and rafts, is subject to the public use as a highway, though it be private property, and not strictly navigable. This right of the public, however, must be exercised in a reasonable manner, since each person has an equal right with every other person to its enjoyment, and the

enjoyment of it by one necessarily, to a certain extent, interferes with its exercise by another. What constitutes reasonable use by the public depends upon the circumstances of each particular case, as the occasions for the use are so numerous and diverse that no positive rule can be laid down to regulate it in every instance with anything like entire precision. The various purposes for which such a highway is used by the public, whether for transporting merchandise, rafting, driving, or booming logs, or securing them at the mill, afterwards, if necessary, require so much space as temporarily to obstruct the way; but if parties so conduct themselves in this business as to discommode others as little as is reasonably practicable, the law holds them harmless. If the rule of law was otherwise, the right of way in many cases could not be made available for any useful purpose: *Brown v. Chadbourne*, 31 Me. 9 [50 Am. Dec. 641]; *Davis v. Winslow*, 51 Id. 264 [81 Am. Dec. 73].

As respects the rights of the land-owner to streams, it is to be observed that while he has a property in the stream he has no property in the water itself aside from that which is necessary for the gratification of his natural or ordinary wants. All the rest of the water is *publici juris*; *aqua curret et debet currere ut currere solebat*. The right of enjoying this flow without disturbance, interference, or material diminution by any other proprietor is a natural right, and is an incident of property in the land, like the right the proprietor has to enjoy the soil itself without molestation from his neighbors. The right of property is in the right to use the flow, and not in the specific water. Each proprietor may make any use of the water flowing over his premises which does not essentially or materially diminish the quantity, corrupt the quality, or detain it so as to deprive other proprietors or the public of a fair and reasonable participation in its benefits: *Race v. Word*, 30 Eng. L. & Eq. 187; *Johnson v. Jordon*, 2 Met. 234 [37 Am. Dec. 85]; *Dickinson v. Grand Junction Canal Co.*, 7 Ex. 282; *Tyler v. Wilkinson*, 4 Mason, 397.

This rule does not require that there shall be no diminution, abstraction, or detention whatever by the upper or lower riparian proprietor, as that would be to prevent all reasonable use of it. The same principle in regard to use by the riparian proprietors applies, as in the public use of the stream as a highway; it must be a reasonable use, and not inconsistent with the reasonable enjoyment of the stream by others who

have an equal right to its use. Reasonable use is the touchstone for determining the rights of the respective parties.

Thus, in considering this subject, we find the public right of way over the stream, and the land-owner's right of soil under it, and his right to use its flow. The rights of both these parties are necessary for the purposes of commerce, agriculture, and manufactures. The products of the forest would be of little value if the riparian proprietors have no right to raise the water by dams and erect mills for the manufacture of these products into lumber. The right to use the water of such streams for milling purposes is as necessary as the right of transportation. Indeed, it is this consideration that oftentimes imparts the chief value to the estate of the riparian proprietors, and without which it would have no value whatever in many instances. Each right is the handmaid of civilization; and neither can be exercised without in some degree impairing the other. This conflict of rights, therefore, must be reconciled.

The common law, in its wonderful adaptation to the vicissitudes of human affairs, and to promote the comfort and convenience of men, as unfolded in the progress of society, furnishes a solution of this difficulty, by allowing the owner of the soil over which a floatable stream, which is not technically navigable, passes, to build a dam across it, and erect a mill thereon, provided he furnishes a convenient and suitable sluice or passage-way for the public by or through his erections. In this way both these rights may be exercised without substantial prejudice or inconvenience.

In *Brown v. Chadbourne*, 31 Me. 9 [50 Am. Dec. 641], before cited, which was an action on the case to recover damages and expenses in getting the plaintiff's logs by the defendant's dam, the court say: "The defendant could by law erect and continue his dam and mills, but was bound to provide a way of passage for the plaintiff's logs." So in *Knox v. Chaloner*, 42 Id. 157, the court affirm the same principle, and hold that "the right of passage remains in the public, for which the mill-owner must make suitable provision at his peril." Again, in *Veazie v. Dwinel*, 50 Id. 487, Rice, J., observes, and the court held, that "while the mill proprietor may erect and maintain his dam, he must at the same time keep open for the use of the public a convenient and suitable passage-way through or by his dam."

Upon the principles of these authorities, the evidence offered

by the defendants, that the Sebasticook River was not navigable, that they owned the land where the dam was built, that the place was suitable for a mill site, and had been used as such for many years, and that "the dam was erected for the purpose of raising water for working water mills," would clearly establish their right to erect and maintain their dam and mills, provided they furnished a suitable passage-way around them.

We think that this condition was complied with in the offer of the defendants to prove that "a sluice-way suitable for running logs, rafts, and other lumber was by them constructed at the time the dam was erected, and in a suitable place, and kept in proper condition by them during the time embraced in the plaintiff's declaration." If such a state of facts existed, there was no nuisance; the plaintiff was protected in the reasonable exercise of his right of way, and the defendants exercised their right to build the dam in a reasonable manner. The suitableness of the dam negatives the idea of a nuisance. If the sluice-way was a suitable one, it did not, in legal contemplation, constitute an unreasonable obstruction to the enjoyment of the plaintiff's easement. It was not necessary that the erection of the mill should precede the construction of the dam; the latter properly preceded the former. It was sufficient if the dam was built at a place suitable for a mill site, and for the purpose of raising the water to propel a mill to be subsequently erected thereon.

We think that the evidence offered by the defendants constitutes a valid defense to the action, and that the exceptions must be sustained, the default stricken off, and the case must stand for trial.

APPLETON, C. J., and WALTON, BARROWS, and TAPLEY, JJ., concurred.

KENT, J., did not sit.

STREAM IN ITS NATURE CAPABLE OF FLOATING LOGS, RAFTS, etc., is, though private property and strictly non-navigable, subject to public use as a highway: *Brown v. Chadbourne*, 50 Am. Dec. 641; *Moore v. Sanborne*, 59 Id. 209; *Treat v. Lord*, 66 Id. 298; *Gerrish v. Brown*, 81 Id. 569; note to *Davis v. Winslow*, 81 Id. 582. What is a reasonable use of a stream by the public as a highway depends upon the circumstances of each particular case: *Davis v. Winslow*, 81 Id. 573; *Pearson v. Rolfe*, 76 Me. 390, citing the principal case to the latter point.

RIGHT OF OWNER OF SOIL THROUGH WHICH STREAM PASSES to erect dams and construct mills: *City of Springfield v. Harris*, 81 Am. Dec. 715;

Brown v. Bosen, 86 Id. 406, and note 414; *Chandler v. Howland*, 66 Id. 487, and note; *Dwinnel v. Veazie*, 69 Id. 94, and note 98; *Fraser v. Sears etc. Water Co.*, 73 Id. 562. The principal case is cited in *Houfe v. Town of Fulton*, 34 Wis. 616, to the point that the erection of a bridge over a non-navigable stream is not unlawful, provided a convenient and suitable passage-way, up and down, is left to the public, and navigation is not materially impeded or endangered.

MORTON v. YOUNG.

[55 MAINE, 2A.]

BURDEN IS UPON PLAINTIFF to show that former suit was without probable cause, where he sues the plaintiff therein for prosecuting a malicious suit.

ONE WHO SETTLES SUIT VOLUNTARILY IS ESTOPPED from claiming that it was prosecuted without probable cause.

MONEY PAID UNDER PROTEST, TO PROCURE RELEASE FROM ARREST, may be recovered on showing that the action in which the arrest was made was malicious and without probable cause. The payment in such case is not voluntary, and does not estop the defendant from proving that the suit was without probable cause.

CASE for malicious suit. The plaintiff was arrested on a special writ, and kept under arrest for some hours, when he paid the arresting officer fifteen dollars, alleging at the time that he owed the defendant nothing, and that he paid such sum rather than be annoyed with the suit. The officer gave the plaintiff a receipt, and released him from arrest. The judge's instructions to the jury appear in the opinion. The plaintiff had a verdict, and the defendant alleged exceptions.

Josiah Crosby, for the defendant.

N. Wilson, for the plaintiff.

By Court, DICKERSON, J. Case for malicious prosecution. The question reserved in this case is, whether the plaintiff, having submitted to the original suit by paying part of the sum demanded, is thereby concluded from showing that it was brought without probable cause. The counsel for the defendant maintains the affirmative of this proposition, but the presiding judge instructed the jury that, while this would be true if the payment was made voluntarily, it would be otherwise if the plaintiff settled the claim to obtain his liberty from arrest and duress, denying all right of the defendant at the time of payment. The jury were instructed, in substance, that they might determine, from the facts and cir-

cumstances attending the settlement of the action, whether the payment was made voluntarily and in submission to the defendant's claim, or compulsorily and in denial of it; if they should find the former, they should acquit the defendant; if the latter, they should return a verdict for the plaintiff; the other points in the case being irrelevant. The verdict of the jury establishes the fact of the payment under duress and protest, and the want of probable cause.

The burden is upon the plaintiff to show that the original suit was commenced without probable cause. If he settled the demand understandingly and voluntarily, he is estopped from denying that the defendant had probable cause for bringing the suit. If he would contest the claim, he should have done so before settlement; if under duress, he should have protested against his liability. If a party is silent where self-interest commands him to speak, he will not be permitted to speak when public policy commands him to keep silent.

The same legal consequences do not follow acts done under duress of arrest and protest as when done freely and voluntarily,—under the abuse as under the legitimate use of legal process. Suppose that, instead of settling the defendant's demand, the plaintiff had given him a deed or bond,—how could he defend an action brought on such instrument if the fact of his giving it is conclusive evidence that the defendant had a valid claim against him? Is the plaintiff the worse off for having paid his money than he would have been if he had given a deed or bond to get his liberty? The rule of law is, that if a man, supposing he has a cause of action against another, cause him to be arrested and imprisoned, and the defendant voluntarily executes a deed for his deliverance, he cannot avoid such deed for duress of imprisonment, although the plaintiff in fact had no cause of action; but when the imprisonment is unlawful, although by color of legal process, a deed obtained from a prisoner for his deliverance by him who is a party to the unlawful imprisonment may be avoided for duress of imprisonment: *Watkins v. Baird*, 6 Mass. 506 [4 Am. Dec. 170].

There is nothing in principle, and we have not found anything in authority, which places a party upon less favorable footing who pays his money to procure his release from arrest on a groundless suit than he who gives his bond or deed for the same purpose; if he may avoid the latter, he may recover back the former.

When the consequences of a man's acts are the subject of legal inquiry, the circumstances attending and the motives prompting them are proper matters for consideration. Especially does this become necessary where the question of volition is involved. To give the same legal effect to a party's acts committed against his own interests, whether prompted from choice or extorted by violent physical and moral compulsion, would be to confound those distinctions in law which are uniformly recognized both in morals and divinity as the touchstone of human accountability.

The law does not make successful wrong a shield to protect its perpetrator from liability to afford redress to the injured party. If the wrong-doer has his hour of triumph, his hour of retribution is sure to come at last. The man who falsely, maliciously, and without probable cause sues out a process, arrests another, and compels him to pay money to procure his liberty, commits a wrong for which the law affords the sufferer redress in damages. The suing out of legal process is an abuse of the law to cover the fraud, the very wrong which the action for malicious prosecution was instituted to redress. It would be a reproach upon the law, if it should allow the payment of the money thus wrongfully and illegally extorted from the plaintiff to have any legal effect against him. In *Watkins v. Baird*, 6 Mass. 506 [4 Am. Dec. 170], the court, Parsons, C. J., held not only that a deed given to procure the deliverance of a party from unlawful arrest and imprisonment on a groundless claim was void, but that an action of malicious prosecution might properly be maintained: *Peirce v. Thompson*, 6 Pick. 192.

The opinion of Tenney, C. J., in *Marks v. Gray*, 42 Me. 86, is in harmony with this view of the law. In that case, the original defendants agreed to allow a certain sum on account of the alleged trespass, and the action was disposed of in accordance with that agreement; there was no coercion, and no payment under protest. The *quære* raised by Mr. Justice Wilde upon this subject, in *Savage v. Brewer*, 16 Pick. 453 [28 Am. Dec. 255], was not germane to the issue upon which his opinion is based, and is, at most, not a *dictum*, but a doubt.

Exceptions overruled.

APPLETON, C. J., and CUTTING, KENT, BARROWS, and DAWFORTH, JJ., concurred.

PROBABLE CAUSE DEFINED: *Ross v. Innis*, 85 Am. Dec. 373, and note 361.

DURESS, WHAT CONSTITUTES: *Clafin v. McDonough*, 84 Am. Dec. 54; *Eadie v. Slimmon*, 82 Id. 395; *Alston v. Durant*, 49 Id. 596.

COMPULSORY PAYMENT OF MONEY, what is: *Cobb v. Charter*, 87 Am. Dec. 178; *Mayor etc. v. Lefferman*, 45 Id. 145, and note 161; *Harmony v. Bingham*, 62 Id. 142, and note 152; *Brumagim v. Tillinghast*, 79 Id. 176, and note 184.

OBJECT OF PROTEST IS TO TAKE FROM PAYMENT ITS VOLUNTARY CHARACTER: *McMillan v. Richards*, 70 Am. Dec. 655.

ESTOPPEL BY ADMISSIONS OR STATEMENTS: *Caldwell v. Auger*, 77 Am. Dec. 515, and note 519; *Thrall v. Lathrop*, 73 Id. 306, and note 308.

PATTERSON v. WILKINSON.

[55 MAINE, 42.]

OFFICE OF INNUENDO IS TO EXPLAIN WORDS SPOKEN, and it cannot extend or enlarge their sense beyond their usual and natural import.

WHERE WORDS ARE ALLEGED TO BE SLANDEROUS BY REASON OF SOME EXTRINSIC FACT, such fact must be averred in a traversable form, with a proper colloquium.

WORDS "MALVINA [PLAINTIFF] HAS BEEN TO SWEAR A YOUNG ONE" fairly convey the idea that she committed the offense of fornication, and are actionable.

DIFFERENT ACTIONABLE WORDS, SPOKEN AT DIFFERENT TIMES, constitute several and distinct causes of action, and should be embodied in separate counts.

DEFENDANT MAY PLEAD GENERAL ISSUE TO ONE COUNT OF DECLARATION, although he demurs to other counts.

CASE for slander. The defendant's demurrer was overruled, and that of the plaintiff sustained, and the defendant alleged exceptions. Other statements in the opinion fully present the case.

J. H. Hilliard, in support of the exceptions.

Piper, Mace, and Laughton, for the plaintiff.

By Court, APPLETON, C. J. This is an action for slander. The defendant, regarding the declaration as containing five counts, pleaded the general issue to the last, and specially demurred to each of the preceding ones. The plaintiff demurred to the defendant's plea of the general issue, and joined the demurrers to the other counts.

Different pleas may be filed to different counts. To some the defendant may demur, and plead the general issue to others. The general issue being pleaded, and being a good plea, the demurrer thereto should have been overruled, and judgment rendered for the defendant upon the last count.

The first count, after alleging the good character of the plaintiff, proceeds as follows: "And whereas one Sarah Patterson, a sister of the plaintiff, had sexual intercourse in the month of February, 1863, with a person not her husband, and was begotten with child, which, if born alive, would have been a bastard, the said Sarah, on the sixteenth day of October, 1863, being then pregnant, and trying to conceal her shame, committed suicide by poisoning herself with arsenic. Nevertheless the said defendant, though well knowing the premises, but contriving maliciously to injure and defame the plaintiff in her good name and reputation, repeated in substance the following in the month of October, 1863, to divers individuals, viz., that the plaintiff was going in the same way that her sister Sarah had gone, meaning to convey and conveying the idea that plaintiff had illicit intercourse with divers persons, and that she was pregnant, and would commit suicide by poisoning herself, to the damage of the plaintiff in the sum of one thousand dollars." And in the second count the words were: "I make no doubt Malvina is in the same situation."

The words that "the plaintiff was going in the same way in which her sister Sarah had gone," or that "she was in the same situation," impute no offense, and cannot be regarded as being libelous. Neither can their meaning be extended or enlarged by innuendo. An innuendo is only explanatory of some matter previously expressed.

The words spoken not importing a crime, and not being upon their face slanderous, the rule as to declaring is thus stated by Chitty, in his work on pleading, vol. 1, p. 342: "When the words do not naturally and *per se* convey the meaning the plaintiff would wish to assign to them, or are ambiguous and equivocal, and require explanation by reference to extrinsic matter to show that they are actionable, it must not only be stated that such matter existed, but also that the words were spoken of and concerning it." The count does not indicate that any conversation was had in reference to the misconduct of the plaintiff's sister. The fact of such misconduct is stated, but in what is technically termed the "colloquium" it is not averred that the words were spoken in relation to such misconduct. If spoken generally, without any such reference, they were obviously not slanderous. "When the words spoken," observes Lord Ellenborough, in *Hawks v. Hawkey*, 8 East, 431, "do not in themselves natu-

rally convey the meaning imputed by the innuendo, but also when they are ambiguous and equivocal, and require explanation by reference to some extrinsic matter to make them actionable, it must not only be predicated that such matter existed, but also that the words were spoken of and concerning that matter." In *Sturtivant v. Root*, 27 N. H. 69, Gilchrist, C. J., says, a "colloquium serves to show that the words were spoken in reference to the matter of the averment. An innuendo is explanatory of the subject-matter sufficiently expressed before, and it is explanatory of such matter only; for it cannot extend or limit the sense of the words beyond their own meaning unless something is put upon the record for it to explain." So in *Carter v. Andrews*, 16 Pick. 1, Shaw, C. J., says: "If the words have the slanderous meaning alleged, not by their own intrinsic force, but by reason of the existence of some extraneous fact, the plaintiff must undertake to prove that fact, and the defendant must be at liberty to disprove it. The fact must be averred in a traversable form, with a proper colloquium, to wit, an averment that the words in question are spoken of and concerning such usage or report or fact, whatever it is, which gives to words otherwise indifferent the particular defamatory meaning imputed to them." For aught that appears in the declaration preceding the innuendo, the conversation might have had reference to the good, and not to the bad, conduct of the plaintiff's sister; and if so, the words are entirely unobjectionable.

The third count sets forth no misconduct of the plaintiff's sister, but is for the utterance of these words, that Mrs. Patterson, the mother of said Malvina, "had not seen all of her trouble, that Malvina was in the same way that Sarah had been." But it is obvious that these words, without preceding averments to give them a special meaning, convey no slanderous imputation upon the character of the plaintiff.

The offense of fornication is punishable by the statutes of this state. An action of slander will lie for charging an unmarried woman with having committed this offense: *Miller v. Parish*, 8 Pick. 385; *Woodbury v. Thompson*, 2 N. H. 194. The words set forth in the fourth count, that "Malvina has been to swear a young one," fairly convey the idea that the plaintiff has committed the offense of fornication.

If the declaration, as the plaintiff now claims, contains but one count, that is bad on special demurrer for duplicity. Each count should contain but one cause of action, and no more. It

is true, it was held in *Rathbun v. Emigh*, 6 Wend. 407, that different sets of words, importing the same charge, laid as spoken at the same time, may be included in the same count. But such is not the case here. The different words set forth in the plaintiff's declaration were spoken at different times, and therefore constitute several and distinct causes of action, and should have been embodied in separate counts.

But the exceptions negative the proposition that there is but one count. They assume five several counts. The presiding judge, in his ruling, acted upon the same assumption. We think there were five counts intended to be filed, though some were defective.

The result is, the three first counts are bad, and the fourth is good on general demurrer. The plea to the fifth is good. The plaintiff's demurrer thereto is overruled.

Exceptions sustained.

KENT, DICKERSON, BARROWS, and DANFORTH, JJ., concurred.

COMPLAINT IN ACTION FOR SLANDER OR LIBEL SHOULD SET OUT WHAT: *State v. Goodman*, 60 Am. Dec. 134; *Miles v. Vanhorn*, 79 Id. 477; must aver that words not actionable *per se* were used in a criminal sense: *Little v. Barlow*, 71 Id. 219; *Rice v. Simmons*, 81 Id. 766; and the meaning of such words cannot be extended by the innuendo in order to make them actionable: *Sheely v. Biggs*, 8 Id. 552; *Coburn v. Harwood*, 12 Id. 37.

DECLARATION IN SLANDER MAY BE SUFFICIENT without the colloquium or innuendoes: *Ausman v. Veal*, 71 Am. Dec. 331.

WORDS IMPUTING UNCHASTITY TO FEMALE: See *Miles v. Vanhorn*, 79 Am. Dec. 477; *Linck v. Kelley*, 87 Id. 362.

GENERAL ISSUE IN LIBEL ADMITS PLAINTIFF'S INNOCENCE of the charge of which he complains: *Sheahan v. Collins*, 71 Am. Dec. 271.

PLEA OF JUSTIFICATION IN SLANDER NEED NOT JUSTIFY COLLOQUIUM. It is enough to justify the words which constitute the slander as charged in the declaration: *Nott v. Stoddard*, 88 Am. Dec. 633.

DEFENDANT CANNOT SHOW, IN MITIGATION UNDER GENERAL ISSUE, that for six years prior to the suit inveterate feelings of hostility had existed between the parties, and that the plaintiff had taken every opportunity to irritate the defendant: *Porter v. Henderson*, 82 Am. Dec. 59.

THE PRINCIPAL CASE IS CITED to the point that in an action of slander, where the words, "You swore to a lie, and I can prove it," are relied on as imputing to the plaintiff the crime of perjury, there must be an averment in the declaration that the words were spoken with reference to some proceeding before a court, or tribunal or officer created by law, or in relation to some matter or thing where an oath is authorized by law; and that the averment must be supported by proof, or the action is not maintainable, in *Small v. Okewley*, 60 Me. 265.

KENNEDY v. BRADBURY.

[55 MAINE, 107.]

COLT NOT EXCEEDING STATUTORY VALUE IS EXEMPT FROM ATTACHMENT when the debtor owns neither oxen nor horses.

TRESPASS for taking and converting a colt. The defendant justified as deputy sheriff holding an execution against the plaintiff, and the plaintiff proved that he owned neither oxen nor horses at the time of the taking. It was ruled that the colt was exempt from attachment, and the defendant excepted.

J. Granger, for the plaintiff.

W. C. Copeland, for the defendant.

By Court, APPLETON, C. J. By the Revised Statutes of 1857, c. 81, sec. 36, "one pair of working cattle, or instead thereof, one or two horses, not exceeding in value two hundred dollars," are exempted from attachment or seizure on execution.

The exemption is for the benefit of the debtor. If not able to own a pair of oxen or a horse or horses of the statutory value, it would be a strange doctrine to deny his right to own a colt, which in process of time will soon become a horse. When a cow is by law exempt from attachment, it has been held that a heifer, if the owner has no cow, is exempt from attachment: *Dow v. Smith*, 7 Vt. 465 [29 Am. Dec. 202]; *Freeman v. Carpenter*, 10 Id. 433 [33 Am. Dec. 210]. The same principle applies in the case at bar, as the value of the colt does not exceed the amount allowed by statute. The exemption is alike within the spirit and intention of the act and the decisions under it: *Bowsey v. Newbegin*, 48 Me. 410.

Exceptions overruled.

CUTTING, KENT, DICKERSON, BARROWS, and DANFORTH, JJ., concurred.

EXEMPTION OF COW FROM EXECUTION INCLUDES HEIFER WHEN: *Carruth v. Grassie*, 71 Am. Dec. 707; and see *Rockwell v. Hubbell*, 45 Id. 252, note.

EXEMPTION OF HORSES FROM EXECUTION: See *Everett v. Herrin*, 74 Am. Dec. 455.

CONSTRUCTION OF WORD "TEAM" IN EXEMPTION STATUTE: *Rockwell v. Hubbell*, 45 Am. Dec. 254.

COLT FOUR MONTHS OLD IS NOT EXEMPT, as forming with its mother a "span of horses" within meaning of Wisconsin statute: *Ames v. Martin*, 70 Am. Dec. 468.

RIGHT TO RECOVER PRICE OF EXEMPT PROPERTY SOLD: *Mulliken v. Winter*, 87 Am. Dec. 495.

ALLEN v. DELANO.

[55 MAINE, 113.]

SALE ON CONDITION — TITLE. — A mare, being with foal, was sold on condition that she was to "remain the property of the vendor until paid for," — held, that the colt subsequently foaled continued the property of the vendor until performance of the condition.

REPLEVIN for a colt. The plaintiff sold the defendant a mare, taking his note therefor, with a written agreement added that said mare should continue the property of the vendor till paid for. The mare was with foal at the date of the writing, and that offspring was the colt replevied. The note was unpaid at the commencement of the suit. The plaintiff was nonsuited, and alleged exceptions.

Herrin, for the plaintiff.

Copeland, for the defendant.

By Court, APPLETON, C. J. The nonsuit must be set aside, and the case stand for trial.

The plaintiff's title to the mare is not questioned. By the terms of the contract, no title vested in the conditional vendee.

The plaintiff, owning the mare, owned likewise the colt. "Of all tame and domestic animals, the brood belongs to the owner of the dam or mother; the English law agreeing with the civil that *partus sequitur ventrem* in the brute creation, though for the most part in the human species it disallows that maxim": 2 Bla. Com. 390. And so are all the authorities. Putting a mare to pasture in consideration of her services does not entitle the bailee to her increase: *Allen v. Allen*, 2 Penr. & W. 166. In case of a pledge, not only the thing pledged passes, but also, as accessory, its natural increase, as, for instance, the young of a flock of sheep: Story on Bailments, sec. 292. Where live-stock is mortgaged, its natural increase and produce becomes subject to the mortgage: *Forman v. Proctor*, 9 B. Mon. 124. The increase of domestic animals gratuitously loaned belongs to the lender: *Orser v. Storms*, 9 Cow. 687 [18 Am. Dec. 543]. Where a mare was sold on condition, the vendor continued to be the owner of her colts until performance of the condition: *Buckmaster v. Smith*, 22 Vt. 203. The defendant, having no title to the mare, can have none to her increase.

Exceptions sustained.

CUTTING, WALTON, DICKERSON, BARROWS, and DANFORTH, JJ., concurred.

ON CONDITIONAL SALE, TITLE REMAINS IN SELLER until the performance of the condition: *Bailey v. Harris*, 74 Am. Dec. 312, and note 313; *Burbank v. Crooker*, 66 Id. 470.

OWNER OF PROPERTY HAS RIGHT BY ACCESSION to what is added to it: *Peirce v. Goddard*, 33 Am. Dec. 764; *Pulcifer v. Page*, 54 Id. 582. Increase of animals belongs to owner of female: Id. 584, note.

OWNERSHIP IN ANIMALS GENERALLY: See *Decker v. Gammon*, 69 Am. Dec. 99; *Wheatley v. Harris*, 70 Id. 258, and note 259.

MORTGAGE OF ANIMALS COVERS INCREASE: *Gregg v. Sanford*, 76 Am. Dec. 726, and note. And to the same point, see *Bryant v. Pennell*, 81 Me. 110, citing the principal case.

HINES v. ALLEN.

[55 MAINE, 114.]

DEFENDANT IN REPLEVIN CANNOT MAINTAIN SECOND ACTION OF REPLEVIN for the same property against the plaintiff in possession during the pendency of the first suit, nor can one deriving title from the defendant after the service of the writ maintain such action.

REPLEVIN for a colt. The defendant, Allen, replevied the same colt from one Delano, and received possession, whereupon Delano sold the colt to the plaintiff for a fair value, and the plaintiff brought this suit. A nonsuit was ordered, and the plaintiff alleged exceptions.

E. Madigan and Copeland, for the plaintiff.

Herrin, for the defendant.

By Court, KENT, J. It is well settled that when property has been taken from a person by a replevin suit against him and delivered to the plaintiff, the defendant in that suit cannot replevy the property back again pending the suit: *Usley v. Stubbs*, 5 Mass. 280 [6 Am. Dec. 29]; *Morris v. De Witt*, 5 Wend. 71; *Sanborn v. Leavitt*, 43 N. H. 475. The reasons for this rule are obvious. Such a course would lead to confusion, multiplicity of suits, and unnecessary complications. It cannot be necessary to vindicate the rights of either party. Those rights can be fully determined in the first suit. It is clear, therefore, in this case, that Delano could not maintain a replevin suit against the plaintiff for the colt.

Can a person who derives his title or claim from a sale or

transfer by Delano, made after the colt had been replevied from him, maintain this action of replevin?

The cases before cited, and others of like character, unquestionably establish as a general principle that the owner of a chattel may take it by replevin from any person whose possession is unlawful, unless it has been taken from him by replevin by the party in possession.

The chattel is not considered in the custody of the law, so as to be for that reason irrepleviable by any person pending the suit, after it has been delivered by the officer to the plaintiff in replevin.

But is it not a clear evasion, if not a nullifying of the doctrine first stated, if a party who cannot replevy himself can, by a new sale or conveyance, colorable or real, enable a third party to do it? Ordinarily the rights and liabilities of parties in suits depend upon the facts existing at the time of the commencement of the action.

In this case, at that time, the present plaintiff had no right or title or interest in this colt. His after-acquired title depends entirely upon the right and title of Delano. This right can be perfectly vindicated in the first suit against Delano. If the plaintiff in that suit (the present defendant) fails to establish his title or right to possession, there must be a judgment for a return, and then this plaintiff can assert his right against Delano by replevin.

If this action can be sustained, we should have two actions of replevin to be tried upon exactly the same facts and the same title. In both the question must be the right set up by the present defendant and the right set up by Delano. The present plaintiff's rights are exactly the same, no less and no more than Delano's.

We think it could not be intended by the principle before stated that a new right could be acquired by a subsequent sale to a third party to institute a replevin which did not exist in the vendors. The reasoning which would prohibit a suit by the defendant in replevin applies with equal force to a subsequent purchaser.

Exceptions overruled.

APPLETON, C. J., and CUTTING, DICKERSON, BARROWS, and DANFORTH, JJ., concurred.

REPLEVIN DOES NOT LIE FOR PROPERTY IN CUSTODY OF LAW: *Lewis v. Buck*, 82 Am. Dec. 73; *Spring v. Bourland*, 54 Id. 243; *Hagan v. Deuell*, 68 Id. 769; nor can cross-replevin be maintained: *Id.*

AFTER JUDGMENT IN REPLEVIN AGAINST DEFENDANT, HE CANNOT SUE OUT ANOTHER WRIT of replevin to prevent execution against himself, and to procure a restoration of the property to himself: *Tison v. Bowden*, 71 Am. Dec. 101.

COMPLAINT IN REPLEVIN: *Van Dresser v. King*, 75 Am. Dec. 649; *Stevens v. Osman*, 48 Id. 696, and note 698; *Pattison v. Adams*, 42 Id. 59.

SMITH v. SAWYER.

[55 MAINE, 189.]

PERSON OTHER THAN REGULAR PARTY TO NOTE, WHO VOLUNTARILY PAYS IT for the honor or credit of an indorser, without request, does not thereby acquire a right to repayment from any prior party thereto.

ASSUMPSIT upon a promissory note. The opinion states the case.

J. Baker, for the plaintiff.

A. G. Stinchfield, for the defendant.

By Court, CUTTING, J. This action is brought against the defendant as second indorser of a note of the tenor following, viz.:—

“PORTLAND, July 9, 1869.

“Four months after date, I promise to pay to the order of Files and Emery five hundred dollars, payable at either bank in Portland. Value received.

(Signed)

“ROBERT FILES.”

Indorsements: “Files and Emery, S. H. Sawyer, B. D. Peck.”

Assuming that the plaintiff, upon the production of the note duly protested, and legal notice to the parties, has established, *prima facie*, the right of recovery, we are brought to the consideration of the defense.

Peck swears that the note was given to him by Files and Emery to raise money upon for their benefit, and that it was discounted by the Norumbega Bank of Bangor, at his request, for the benefit of Files and Emery, to whom he paid over the proceeds, and that the defendant and himself were only accommodation indorsers. That subsequently Files and Emery conveyed to him their stock of goods, of the value of between eleven and twelve thousand dollars, for the purpose of securing him for liabilities assumed for them. That at the time the

note matured he had funds in the Norumbega Bank, partly accruing from the proceeds of the sale of that stock of goods; and according to the best of his recollection, he paid the note by giving his check to the cashier of the bank, or by giving him current funds to meet it.

To rebut this testimony, George R. Smith was introduced by the plaintiff, who testified that he was cashier of the bank at the time the note was discounted, and that neither Peck nor any party to the note ever paid it to the bank; that the bank failed in December, 1859. After that the note remained in his custody until he passed it to the plaintiff, without the knowledge of the officers of the bank; that he owed the plaintiff, and if he collects the note his liabilities will be diminished to that amount.

On cross-examination, the witness stated that the facts disclosed in his letter to Peck were substantially true, which is as follows; viz.:—

“BANGOR, July 5, 1865.

“FRIEND PECK,—I received a few days ago from my brother's attorney a list of interrogatories to be put to you in the case of my brother against S. H. Sawyer, on Files's note indorsed by him.

“I thought I would write you about it, for you may have forgotten about the note. The note was discounted for you, together with sundry other notes, July 23, 1859, by the Norumbega Bank, and when it became due was sent to Portland for payment, and was protested for non-payment. This, I think, was in November, 1859, and at that time, you will recollect it was very important to have your credit stand good at the Norumbega Bank, and therefore I took up the note with my own funds. The note has never been paid to this day, or any part of it. My brother soon afterwards loaned me some money, and I gave him the note in part payment. I write this so that you may know the history of the note. I don't know as it is necessary to state any of the above facts in your answers.

Respectfully yours,

“GEO. R. SMITH.”

Now, upon the foregoing facts substantially stated, the parties have agreed that this court should render such judgment as they and the law require.

Upon the facts, we are inclined to the opinion that Peck never paid the note to the bank, although their mutual relations, perhaps, never have and never will be fully disclosed.

At the same time, we may well assume that George R. Smith, from his own funds, paid the note to the bank in order to have Peck's credit stand good at that institution. In other words, he paid the note *supra protest*, without the request of any parties to the note. Under such circumstances, it is well settled as to notes, the person so paying has no cause of action against any party to the note, as was settled in *Willis v. Hobson*, 37 Me. 405, where Shepley, C. J., remarking upon the authority of Story on Notes, sec. 453, uses the following language: "When a person, not being a regular party to a note, pays it for the honor or credit of the maker or any indorsers, without request, he does not thereby acquire a right to repayment from any of the prior parties, for whose honor he may have paid it. He can no more make another his debtor by the payment of a note without request, express or implied, than he could by the payment of any ordinary account."

If George R. Smith's letter to Peck "is substantially true," this case is within the foregoing decision. If it be untrue, then it would appear that Smith, the cashier, without authority, and in violation of his legal duties, selected from the fossil remains of an insolvent bank, for his private use, the note in suit, and transferred it to the present plaintiff. A charitable construction of his testimony inclines us to give force to the disclosures in his letter. Besides, the lapse of time during which the note was suffered to remain in the bank after protest, without any action, has a strong tendency to prove that the note had been paid, either by Peck or Smith.

Plaintiff nonsuit.

APPLETON, C. J., and WALTON, DICKERSON, BARROWS, and TAPLEY, JJ., concurred.

DRAWER OF BILL MAY ACCEPT OR PAY IT UNDER PROTEST FOR HONOR OF DRAWER OR INDORSER: *Swope v. Ross*, 80 Am. Dec. 567; and see cases collected in note 570, as to the nature and effect of the contract of acceptance.

NO ONE CAN ACCEPT BILL OF EXCHANGE BUT PERSON UPON WHOM IT IS DRAWN, EXCEPT FOR HONOR: *Heenan v. Nash*, 83 Am. Dec. 790; and see *Rice v. Ragland*, 53 Id. 737; *Crozier v. Kirker*, 51 Id. 724.

HOLDER OF BILL IS ENTITLED TO ABSOLUTE, UNCONDITIONAL ACCEPTANCE of his bill, and may reject any other: *Ford v. Angelrodt*, 88 Am. Dec. 174.

PAYMENT OR ACCEPTANCE TO PREVENT DISHONOR. — *Payment for Honor.* — Payment for honor is where a bill of exchange, having been protested for non-payment, is paid by another person for the honor of some one of the parties, or for the honor of all the parties, as the case may be: *Byles on Bills*, 272

Such payment is always made after protest, and is called accordingly payment *supra protest*. It is confined to bills of exchange, and does not extend to promissory notes: Story on Notes, sec. 453. Any party to a bill of exchange may pay for honor: Byles on Bills, 272. Thus the drawee of a bill may pay it *supra protest* for the honor of the drawer or indorser: *Swope v. Ross*, 40 Pa. St. 186; S. C., 80 Am. Dec. 567. But it is said that the acceptor, if he has previously made a simple acceptance, cannot pay for honor of an indorser, because as acceptor he is already bound in that capacity. If, however, he has accepted the bill without having effects of the drawer in his hands, and no provision has been made by the drawer for payment, he may pay it *supra protest*, and have his remedy on the bill against the drawer: Chitty on Bills, 508. At common law, a stranger cannot voluntarily constitute himself the creditor of another by paying his debt without his request and acquire a right to reimbursement. But this is allowed by the law merchant in respect to bills of exchange and for the benefit of trade, provided he makes the payment after protest, and the form of proceeding sanctioned by the custom of merchants be substantially followed: *Vandewall v. Tyrrell*, 1 Moody & M. 87; *Gazzam v. Armstrong*, 3 Dana, 554; and see *Geralopulo v. Wieler*, 10 Com. B. 690. The mode of payment is for the payor to go before a notary public and make a declaration for whose honor the bill is paid, which declaration should be recorded by the notary, either in the protest or in a separate instrument: Byles on Bills, 272. The payor must then give reasonable notice to the party for whose honor he makes payment, otherwise such party will be under no obligation to refund: *Wood v. Pugh*, 7 Ohio, 501; *Gazzam v. Armstrong*, 3 Dana, 554. A stranger who pays *supra protest* for the honor of the bill generally is to be considered as an indorsee paying full value, and he is entitled to recover against all the parties to the bill: *Mertens v. Winnington*, 1 Esp. 113; Chitty on Bills, 509. If payment was made for the honor of a particular indorser, the payor may sue him and all prior parties, but not subsequent indorsers, the latter being discharged by such payment: *Id.* And see *Ex parte Swan*, L. R. 6 Eq. 344.

Acceptance for Honor. — Acceptance for honor, or *supra protest*, is where acceptance of a bill is refused by the original drawee and the drawee *au besoin*, if any; and a third person accepts the bill for the honor of any one or all the antecedent parties thereto: See Story on Bills, sec. 255; Byles on Bills, 267; *Hoare v. Cazenove*, 16 East, 391. There can be an acceptance for honor only when the bill has been protested: *Id.*; *Gazzam v. Armstrong*, 3 Dana, 554; and it is at the election of the holder to take or refuse an acceptance for honor: *Mitford v. Walcott*, 12 Mod. 410; *Pillans v. Van Mierop*, 3 Burr. 1663. But if the acceptance is for the honor of a particular party, and the holder takes it, he cannot sue that party before maturity of the bill, and its dishonor by such acceptor: Story on Bills, sec. 258; *Williams v. Germaine*, 7 Barn. & C. 468; and if the acceptance is generally for the honor of the bill, the holder cannot sue any of the parties before its maturity and dishonor: Chitty on Bills, 375; Story on Bills, sec. 258. The acceptance inures to the benefit of all the parties subsequent to him for whose honor it was made: *Konig v. Bayard*, 1 Pet. 250; *Ex parte Swan*, L. R. 6 Eq. 344. It is well settled that a stranger or one not a party to the bill may accept for honor: *Jackson v. Hudson*, 2 Camp. 447; *Jenkins v. Hutchinson*, 13 Q. B. 744; *May v. Kelly*, 27 Ala. 497; *Walton v. Williams*, 44 Id. 347; and the drawee himself may accept for the honor of the drawer or of an indorser: Byles on Bills, 268; and see Story on Bills, sec. 259; *Schimmelpennich v. Bayard*, 1 Pet. 264. So different persons may be acceptors *supra protest* for the honor of different

parties to the bill: Chitty on Bills, 375, 376; *Jackson v. Hudson*, 2 Camp. 447.

The method of accepting for honor is as follows: The acceptor for honor personally appears before a notary public with witnesses, and declares that he accepts such protested bill in honor of the drawer or indorser, as the case may be, and that he will satisfy it at the time appointed. He then subscribes his name to the words following: "Accepted *supra protest* in honor of A B," or, more usually, "Accepts S. P.": Chitty on Bills, 346; Byles on Bills, 267; Daniel on Negotiable Instruments, sec. 523; and see *Mitchell v. Baring*, 10 Barn. & C. 4. It should be designated for whose honor the acceptance was made, and a general acceptance *supra protest*, not designating for whose honor it was made, will be considered as made for the honor of the drawer: Chitty on Bills, 346. So the acceptor *supra protest* must at once give notice of his acceptance to the person for whose honor it is made: Story on Bills, sec. 259; and see *Wood v. Pugh*, 7 Ohio, 501.

An acceptance for honor is in the nature of a conditional acceptance. It is an undertaking to pay if the original drawee, upon a presentment to him for payment, should persist in dishonoring the bill, and such dishonor by him be notified by protest to the person who has accepted for honor: *Williams v. Germaine*, 7 Barn. & C. 457. In order, therefore, to render the acceptor *supra protest* liable, the holder is bound in the first instance to demand payment of the original drawee when the bill becomes due, and if he fails to pay, it must then be presented in due time to the acceptor *supra protest*: See Chitty on Bills, 348, 351; Story on Bills, sec. 281; *Mitchell v. Baring*, 10 Barn. & C. 4; *Barry v. Clark*, 19 Pick. 220. If the latter refuses to pay on such presentment, there must be another formal protest, stating the presentment for payment to the drawee, the protest for his non-payment, the presentment of the bill and acceptance to the acceptor *supra protest*, demand of payment of him, and the protest for his non-payment: Chitty on Bills, 352; and notice thereof must be forthwith forwarded to the drawer and indorsers: *Id.*

As it regards the rights of an acceptor for honor, he has recourse against the party for whose honor the acceptance was made, and all parties against whom the latter would have recourse, for all damages incurred by reason of his acceptance: Byles on Bills, 271; Daniel on Negotiable Instruments, sec. 526; *Mitford v. Walcott*, 1 Esp. 112; *Gooddall v. Polhill*, 1 Com. B. 233. But the acceptor for the honor of the drawer cannot recover against him without proof of presentment to the drawee, and non-acceptance or non-payment by him, and notice thereof to the drawer: *Baring v. Clark*, 19 Pick. 220; *Schofield v. Bayard*, 3 Wend. 488. And the acceptor for honor acquires no new right by the transaction which the holder had not at the time of the acceptance: *Konig v. Bayard*, 1 Pet. 250. And it is held that an acceptor for the honor of the drawer is estopped from denying the genuineness of the bill, and will be bound by his acceptance, although the payee was a fictitious person: *Phillips v. Im Thurn*, L. R. 1 C. P. 463. So the acceptance *supra protest* after sight of a bill of exchange admits the genuineness of the signature of the drawer, and consequently is binding in favor of a *bona fide* holder for value without notice, although the signature turns out to be a forgery: *Salt Springs Bank v. Syracuse Sav. Inst.*, 62 Barb. 101.

KIMBALL v. BILLINGS.

[55 MAINE, 147.]

PERSON IS GUILTY OF CONVERSION WHO SELLS PROPERTY OF ANOTHER, without the owner's authority, although he acts as the agent or servant of one claiming to be the owner, and is ignorant of his principal's want of authority.

IT IS NO DEFENSE TO ACTION OF TROVER FOR PROPERTY SOLD BY DEFENDANT as agent of another, that the property was government bonds payable to bearer, if the principal was not the *bona fide* purchaser.

TROVER for the conversion of five United States government bonds, with interest coupons attached, three of the bonds being of the denomination of one hundred dollars, and two of the denomination of fifty dollars. The bonds were stolen from the plaintiff, and received by one Mrs. Witham, knowing that they had been stolen. The defendant sold part of the bonds, and gave the proceeds to Mrs. Witham, and testified that he acted as her agent in making the sale, and had no knowledge or suspicion that she was not the true owner of the bonds. The case was taken from the jury and continued on report to the full court.

A. Libbey and L. Clay, for the plaintiff.

J. Baker and N. M. Whitmore, for the defendant.

By Court, WALTON, J. It is no defense to an action of trover that the defendant acted as the agent of another. If the principal is a wrong-doer, the agent is a wrong-doer also. A person is guilty of a conversion who sells the property of another, without authority from the owner, notwithstanding he acts under the authority of one claiming to be the owner, and is ignorant of such person's want of title: Story on Agency, secs. 311, 312, and authorities there cited; *Coles v. Clark*, 3 Cush. 399.

If, therefore, it be true, as the defendant says, that in selling the bonds sued for in this case he acted as the agent or servant of Mrs. Witham, and had no knowledge or suspicion that she was not the true owner of them, these facts constitute no defense to the suit. Mrs. Witham could not secure to him immunity for an act which she could not lawfully do herself.

Nor is it any defense that the property sold was government bonds payable to bearer. The *bona fide* purchaser of a stolen bond payable to bearer might perhaps defend his title against even the true owner. But there is no rule of law that secures

immunity to the agent of the thief in such cases, nor to the agent of one not a *bona fide* holder. The evidence in this case satisfies us that Mrs. Witham was not a *bona fide* holder; that she received the bonds well knowing that they had been stolen, if she did not in fact procure the theft to be committed. The defendant took the bonds into his possession, and, as her agent or servant, sold them.

The sale was a conversion of them, which made not only Mrs. Witham, but the defendant, liable for their value to the true owner. The rule of law protecting *bona fide* purchasers of lost or stolen notes and bonds payable to bearer has never been extended to persons not *bona fide* purchasers, nor to their agents.

In *Burditt v. Hunt*, 25 Me. 419 [43 Am. Dec. 289], cited by defendant, the servant was held not liable, because he did not participate in the illegal sale; he was a mere carrier of the goods from the person lawfully in possession of them to the person to whom they were sold; and the court held that such a removal was not, under the circumstances, an act of conversion. But the doctrine is there recognized that a sale by the agent would have made him liable.

Bonds to the amount of four hundred dollars were stolen from the plaintiff, but the evidence fails to satisfy us that more than three hundred dollars' worth of them came into the hands of the defendant and were sold by him. The exact date of the sale is not shown, but we are satisfied it was as early as the 1st of November, 1863.

Judgment for plaintiff for three hundred dollars, and interest from November 1, 1863.

APPLETON, C. J., and CUTTING, DICKERSON, and TAPLEY, JJ., concurred.

CONVERSION, WHAT CONSTITUTES: *Webber v. Davis*, 69 Am. Dec. 87, and cases collected in note 90; *Pribble v. Kent*, 71 Id. 327, and note 330.

CONVERSION OF CERTIFICATE OF BANK SHARES: *Connor v. Hillier*, 73 Am. Dec. 106; of promissory note: *Davis v. Funk*, 80 Id. 519; *Lowremore v. Berry*, 54 Id. 188; *Potter v. Merchants' Bank*, 86 Id. 273.

ONE WHO AIDS AND ABETS ANOTHER IN KEEPING PROPERTY FROM ITS RIGHTFUL OWNER is guilty of conversion: *Scott v. Perkins*, 48 Am. Dec. 470; *Clark v. Whitaker*, 48 Id. 160; and any act of ownership over property taken which is inconsistent with the true owner's right of dominion over it is evidence of a conversion: *Ragsdale v. Williams*, 49 Id. 406.

AGENT OF ONE JOINT OWNER SELLING ENTIRE CHATTEL is guilty of conversion: *Perminter v. Kelly*, 54 Am. Dec. 177.

BUYING HORSE FROM ONE WHO HAD NO RIGHT TO SELL HIM, AND SUBSEQUENTLY EXERCISING DOMINION OVER HIM by letting him to another person, amount to a conversion, although the buyer believed his title to the horse to be perfect: *Gilmore v. Newton*, 85 Am. Dec. 749; and it is a conversion if one hires a horse to be driven to one place and voluntarily drives him to another: *Woodman v. Hubbard*, 57 Id. 310.

CONVERSION BETWEEN CO-TENANTS: *Fiquet v. Allison*, 86 Am. Dec. 54; *Redington v. Chase*, 82 Id. 189.

BROWN v. NOURSE.

[55 MAINE, 280.]

PLEA OF GENERAL ISSUE ADMITS PLAINTIFF'S CAPACITY TO SUE, and the question of such capacity can be raised only by plea in abatement.

IT IS NOT REQUIRED, UNDER MAINE PRACTICE, THAT WRIT SHOULD SET OUT WHERE or by what authority administration was granted.

ACTION ON UNINDORSED NEGOTIABLE NOTE CAN BE MAINTAINED ONLY BY PAYEE or his personal representative.

MAINE STATUTE OF LIMITATIONS IS NO BAR TO ACTION IN THAT STATE UPON NOTE MADE IN ANOTHER STATE, where the defendant has not resided in Maine since the date of the note.

PLEA IN ABATEMENT IS NOT AMENDABLE after demurrer filed thereto.

ASSUMPSIT upon a promissory note, negotiable and unindorsed. The note was made payable to J. W. L. Brown, and signed by the principal defendant. The plaintiff alleged herself "of the city, county, and state of New York, administratrix of the estate of J. W. L. Brown, late of Dubuque, in the state of Iowa, deceased," and the principal defendant as resident in the "state of Nevada." The defendant appeared by counsel, and filed a plea in abatement, therein alleging that the plaintiff "is not now and never has been the administratrix of the goods and estate of J. W. L. Brown, late of Dubuque, etc., deceased, in and for the state of Maine"; to which plea the plaintiff demurred generally. When the case came on for trial, the defendant moved for leave to amend his plea in abatement, which was denied, whereupon he joined the plaintiff's demurrer, which was sustained. He then pleaded the general issue, with a brief statement alleging in bar that the plaintiff "was never duly appointed administratrix of the goods and estate of her said alleged intestate within and for this state, and has not so alleged herself in her said writ," etc.; and also set up the statute of limitations. The plaintiff was allowed on motion to indorse upon her writ that the note in suit was "the property of the plaintiff in her individual right

and capacity, and this suit is in the name of the plaintiff as administratrix, for her benefit individually, and not as administratrix"; and she put in certain evidence tending to show that the note was her individual property. It was also in evidence that the plaintiff had been appointed administratrix of her husband's estate in this state since the commencement of this action; that previous thereto she was such administratrix in Iowa. It was also proved that the defendant had not resided within this state since the date of the note. Continued on report to the full court.

Howard and Cleaves, for the plaintiff.

Bradbury and Bradbury, for the defendant.

By Court, KENT, J. There can be no question that the plea in abatement was fatally defective, and that the amendment was not and could not be properly allowed. It is therefore out of the case.

The principal question is, whether under the general issue the defendant admits the plaintiff's capacity as administratrix, or whether that is or can be put in issue by that plea. This question seems to have been directly determined by this court in the case of *Clark v. Pishon*, 31 Me. 503. It was there held that "by pleading the general issue, the defendant admitted the plaintiff's capacity." This case was decided after the decision in *Langdon v. Potter*, 11 Mass. 315, in which a different doctrine is indicated, although that case was cited by counsel in *Clark v. Pishon*, *supra*. On examination of the authorities, we are satisfied that the decision by our own court is, to say the least, as well supported in every respect as the contrary doctrine.

In *Thynne v. Protheroe*, 2 Maule & S. 553, in the king's bench, the court decided that even where the plaintiff had made profert of the letters of administration, and the plea was *non assumpsit*, yet, as there was no necessity to produce the letters, and as the plea admitted that he was administrator, the defendant had no right to insist upon their production. "If this could be done, it would be the means of getting the benefit of *ne unques administrator* upon the general issue."

In *Gridley v. Williams*, 1 Salk. 38, it was resolved that the plea of *non est factum* admits the plaintiff to be a good administrator. The same doctrine is in substance found in Com. Dig., Pleader, 2 D, 10-14.

This decision is also supported by its analogy to the numerous cases in which it is decided that where a corporation sues, the plea of the general issue admits the existence of the corporation and its right to sue. The principle which lies at the bottom is, that where, independently of all merits, a party would deny the capacity of the plaintiff and his right to be heard in court in the case, the objection must be interposed *in limine*, so as to prevent unnecessary costs and delay. It is a safe and extremely convenient rule in practice, and not unreasonable in its requirements. It only demands that what is preliminary in its nature shall be interposed and determined before the merits are reached.

We do not see any sufficient reason for overruling *Clark v. Pishon*, *supra*.

It is objected that the plea of the general issue admits only what is set forth in the writ, and that the plaintiff does not therein say that she is administratrix of her intestate within this state. If the objection is at this stage of the case open to the defendant, the reply is that she does allege that she is "administratrix of the estate of J. W. L. Brown, late of," etc. The promises set forth are all to the intestate.

This is the usual mode of declaring in this state. It has never been required that the writ should set out where or by what authority the administration was granted. The administrator never makes profert of his letters of administration. The legal inference is, when a suit is brought in the name of an administrator, and he declares that he is administrator of a certain deceased person, that the declaration is, that it was granted in this state. For he cannot be administrator, with a right to sue in our courts, unless he has been here appointed.

This is clearly stated in the case relied upon by the defendants, before cited: *Langdon v. Potter*, 11 Mass. 313.

It becomes unnecessary for us to consider the question how far a subsequent appointment as administrator would enable him to maintain an action before commenced in that capacity. We are, as before shown, bound to regard the point of capacity to sue, as conceded by the pleadings.

We do not perceive that the indorsement on the writ, that the note in suit was the property of the plaintiff in her own individual right, can affect the determination of this case. The note was payable to the intestate and to his order. It has never been indorsed, and therefore the action could only be brought

by him or his personal representative. It is not unusual for one who has an equitable interest in a chose in action, commenced in the name of the original payee, to indorse on the writ a notice of his claim to the proceeds of the judgment. It makes no difference that the claim of such interest is made by the administratrix in her individual character or capacity. Her rights are as distinctly separate as if vested in another person. It makes no difference to this defendant whether this debt, when paid, is to be distributed to the creditors or to be paid to an heir or the widow. This is a matter to be adjusted between those interested in the estate. The action may be maintained by the administratrix, because the legal right and interest in the note has never been transferred by indorsement.

The statute of limitations is invoked by the defendant. But he never resided in this state after the cause of action accrued, and therefore the statute never began to run: *R. S.*, c. 81, sec. 114; *Brigham v. Bigelow*, 12 Met. 270; *Putnam v. Dike*, 13 Gray, 535.

As the statute in this case never began to run, the provisions in section 103 of the above chapter cannot be applied. That section is intended to reach only those cases in which the statute has begun to run, and in which, but for this provision for extension, it would be a bar in six years. But here no such state of facts exists: *McMillan v. Wood*, 29 Me. 217.

The judgment must be for the plaintiff.

Judgment for plaintiff for amount of note and interest, and costs.

APPLETON, C. J., and WALTON, BARBOWS, DANFORTH, and TAPLEY, JJ., concurred.

PLEA OF GENERAL ISSUE IS WAIVER OF ALL OBJECTIONS TO PERSON OF PLAINTIFF, and admits his capacity to sue: *Brown v. Illinois*, 71 Am. Dec. 49; *McIntire v. Preston*, 48 Id. 321.

MISNOMER IS WAIVED, if not pleaded in abatement: *Trull v. Howland*, 57 Am. Dec. 82, and note 85.

SUFFICIENT AVERMENT OF CAUSE OF ACTION TO BE IN ADMINISTRATOR AS SUCH: *Wyatt v. Rambo*, 68 Am. Dec. 89, and note 100.

WHEN PERSONAL REPRESENTATIVE MAY SUE IN HIS INDIVIDUAL CAPACITY: *Sims v. Boynton*, 70 Am. Dec. 549; *Lawson v. Lawson*, 80 Id. 702.

POWER OF ASSIGNEE OF EXECUTOR OR ADMINISTRATOR TO SUE IN FOREIGN COURTS: *Peterson v. Chemical Bank*, 88 Am. Dec. 310, note.

STATUTE OF LIMITATIONS, CONFLICT OF LAWS AS TO: See *Riser v. Snoddy*, 65 Am. Dec. 740, and cases collected in note 744; *Brown v. Brown*, 48 Id. 52, and note 56.

ABSENCE FROM STATE, WHAT CONSTITUTES, and effect of upon the running of the statute of limitations: *Langdon v. Dowd*, 83 Am. Dec. 641, and extended note 644.

SEALED NOTE IS NOT NEGOTIABLE, AND ACTION IS NOT MAINTAINABLE THEREON in the name of a person to whom it has been transferred: *Conine v. Junction etc. R. R. Co.*, 89 Am. Dec. 230.

THE PRINCIPAL CASE IS CITED as follows, and to the points stated: Objection to the maintenance of replevin by all of several plaintiffs, because only one of them has given the bond required by statute, should be taken by abatement, and is not open to the defense under the plea of *non cepit*: *Pope v. Jackson*, 65 Me. 163. So the non-existence of a plaintiff corporation can only be taken advantage of by plea in abatement, and cannot be set up as a ground of defense by a brief statement filed with a plea in bar, nor can it be given in evidence under the general issue: *Dresden School District v. Aetna Ins. Co.*, 66 Id. 370. So the capacity and legal authority of one to whom the defendants have given a promissory note as treasurer of the ministerial and school fund of a town cannot be questioned by them in a suit on the note, under a brief statement accompanying the general issue; and his want of authority is to be pleaded, if at all, in abatement: *Abbott v. Chase*, 75 Me. 86. According to the current of authority, the statute of limitations operates merely upon the remedy, and is consequently local in its operation, and the law of the place where the remedy is sought, and not that of the *situs* of the contract must control: *Thompson v. Reed*, 75 Id. 406.

BILLINGS v. GIBBS.

[55 MAINE, 232.]

DEFENDANT IN REAL ACTION BETWEEN TENANTS IN COMMON CANNOT GIVE IN EVIDENCE UNDER GENERAL ISSUE that he "had never ousted the plaintiff of his portion of the demanded premises, nor in any way hindered his taking possession, but had only been in possession of the same as tenant in common with the demandant."

WRIT of entry by one tenant in common against his co-tenant. The plaintiff objected to the admission of certain evidence offered by the defendant under the plea of the general issue, and which is set out in the *syllabus*, and thereupon the case was continued on report to the full court. Other facts appear in the opinion.

N. S. and F. J. Littlefield, for the plaintiff.

S. C. Strout, Gage, and S. M. Harmon, for the defendant.

By Court, APPLETON, C. J. By the Revised Statutes of 1857, c. 104, sec. 6, "every person alleged to be in possession of the premises demanded in such writ claiming any freehold therein may be considered a disseisor for the purpose of trying the right; but the defendant may plead in abatement, and not in

bar, that he is not tenant of the freehold, or by a brief statement under the general issue filed within the time allowed for pleas in abatement, unless by leave of court the time therefor is enlarged; and he may show that he was not in possession of the premises when the action was commenced, and disclaim any right, title, and interest therein, and proof of such fact shall defeat the action," etc.

The demandant and tenant are tenants in common of the demanded premises, the demandant owning three fourths and the tenant one fourth of the same. The writ as amended is for the demandant's three fourths.

The tenant pleaded the general issue, *nul disseisin*. This plea admits the tenant to be in possession of the demanded premises: *Colburn v. Grover*, 44 Me. 47. After *nul disseisin* pleaded in a writ of entry by a tenant in common, proof of actual ouster is unnecessary: *Stevens v. Winship*, 1 Pick. 317 [11 Am. Dec. 178]. If the tenant "does not disclaim," remarks Parsons, C. J., in *Higbee v. Rice*, 5 Mass. 344 [4 Am. Dec. 63], "or plead non-tenure, he admits himself tenant of the freehold by the plea of *nul disseisin*. In this writ, the demandants demand of the tenants seisin of two eighths. If he admitted the demandants' title, he might have pleaded that he did not hold the two eighths demanded against him, and this he might well plead, although he claimed to be seised of the remaining six eighths as tenant in common with the demandants. On this plea of non-tenure he might have compelled the demandants to prove an ouster to entitle them to recover. But non-tenure cannot be given in evidence under the general issue in this action." The form of a plea in such case is given in Stearns on Real Actions, Appendix No. 48.

The tenant did not plead non-tenure in abatement, nor file a brief statement setting forth the fact of non-tenure "within the time allowed for pleas in abatement." He asked for no enlargement of time within which to file such brief statement. The language of the statute is peremptory, and applies equally to all tenants of the freehold, whether holding in severalty or in common. The demandant claims three fourths of the premises described in his writ. If the tenant did not claim to hold these premises, he should have said so by his plea or brief statement, and in due season, and then the cause would have terminated. It is just as easy to disclaim any right, title, and interest in the demanded premises when the demandant claims a fraction as when he claims the whole of an estate.

By the provisions of the statute, as well as by the reported decisions of this court, the proof offered was inadmissible under the pleadings: *Wyman v. Brown*, 50 Me. 139; *Putnam Free School v. Fisher*, 38 Id. 324; *Colburn v. Grover*, 44 Id. 47.

In *Small v. Clifford*, 38 Me. 213, it does not appear that the brief statement was not seasonably filed. The counsel did not take that objection. The court might well assume it duly filed if the point was not raised.

Tenant defaulted. Judgment for demandant.

CUTTING, KENT, WALTON, DICKERSON, BARROWS, and DANFORTH, JJ., concurred.

ACTIONS BY TENANT IN COMMON AGAINST CO-TENANT: See *Pico v. Columbet*, 73 Am. Dec. 550, note 555; *Wait v. Richardson*, 78 Id. 622; *Symonds v. Harris*, 81 Id. 553; ejectment lies where one tenant is ousted by co-tenant: *Hutchinson v. Chase*, 63 Id. 645, and note 650; and ouster is question of fact for jury: *Workman v. Guthrie*, 72 Id. 654; *Carpentier v. Mendenhall*, 87 Id. 135; may be inferred from long undisturbed possession by one co-tenant with acts of exclusive ownership: *Alexander v. Kennedy*, 70 Id. 358.

PRACTICE WHERE DEFENDANT IN EJECTMENT BY ONE CO-TENANT AGAINST ANOTHER INTENDS TO DENY OUSTER: *Tongue v. Nutwell*, 79 Am. Dec. 649.

ACTION FOR USE AND OCCUPATION BY TENANT IN COMMON AGAINST CO-TENANT, when it lies: *Crane v. Waggoner*, 89 Am. Dec. 493.

CONVERSION BETWEEN CO-TENANTS: *Fiquet v. Allison*, 86 Am. Dec. 54.

BUFFUM v. RAMSDELL.

[55 MAINE, 252.]

JUDGMENT AGAINST TWO DEFENDANTS JOINTLY IS ONE AND ENTIRE, and will be held invalid against both defendants if one was not an inhabitant of the state, and no legal service of the writ was made upon him.

IMPRACHMENT OF JUDGMENT BY ONE NOT PARTY THERETO. — Upon a bill to redeem a mortgage, brought by one claiming a right under a levy upon the mortgagor's equity of redemption, the respondent, not being a party or privy to the judgment, may avail himself of any illegality in it.

BILL in equity. The complainant alleged that one Bousley, being seised in fee of certain lands, conveyed them by mortgage to the respondent; that said mortgage was without consideration, and was made for the fraudulent purpose of defrauding, hindering, and delaying the mortgagor's creditors, of whom the complainant was one, and claimed that as to him the said mortgage ought to be declared void; or if the court should find the evidence adduced insufficient to establish the fact that said mortgage was fraudulent, then the complainant

claimed the right to redeem the mortgage under a levy upon the mortgagor's equity of redemption. The levy was made by virtue of an execution issued upon a judgment in the complainant's favor against said Bousley and one Locke. Other facts appear in the opinion.

S. C. Strout and Gage, for the complainant.

W. L. Putnam, for the respondent.

By Court, DANFORTH, J. To enable this complainant to sustain his bill, it is conceded that he must show a good title to the land claimed. To do this, he offers in evidence a judgment in his favor against Joseph Bousley and Milton P. Locke, recovered at a term of this court holden in the county of Oxford on the second Tuesday of August, 1863, an execution issued thereon, and a levy upon the land as the property of Bousley. The respondent, who also claims under Bousley by a prior deed alleged to be fraudulent as against creditors, contests the plaintiff's title on the ground that his judgment is erroneous. It is conceded that Locke was not an inhabitant of the state; that no legal service was made upon him. As to him the court had no jurisdiction, and the judgment against him is therefore void: *Penobscot R. R. v. Weeks*, 52 Me. 456.

The judgment being an entirety, if void in part is void in all; if reversed as to one of the parties, it must be reversed as to all: 2 Saund. Pl. 101; 2 Bac. Abr. 227, 228; *Benner v. Weld*, 45 Me. 483; *Hemmenway v. Hickey*, 4 Pick. 500.

It is true that in some cases where the judgment is several as to the parties, it may be reversed as to one and affirmed as to the others; as in *Whiting v. Cochran*, 9 Mass. 532, where judgment was rendered against the principal defendant and a trustee, it was decided that the principal defendant could not avail himself of a want of service on the trustee; so, in *Shirley v. Lunenburg*, 11 Id. 379, where the same principle is recognized. But no such severalty is involved in the judgment under consideration. On the contrary, it is against the parties jointly, and both as to them and the subject-matter is one and entire. It must, therefore, stand or fall as a whole.

The case of *Ellis v. Bullard*, 11 Cush. 498, relied upon by the plaintiff, does not weaken this position, but tends rather to confirm it. This was a writ of error to reverse a judgment having the same defect as that in the judgment relied upon by the plaintiff in the case at bar. The court refused to reverse the judgment, not because there was no error, but because one

of the plaintiffs, and the one having cause to complain, had released that error and refused to prosecute the suit. Thomas, J., remarks: "Were this not so, yet, as upon the reversal of a judgment on a writ of error the court may enter the same judgment which the court below might have rendered, it may enter judgment against Ellis." Here is a very clear intimation that but for the release of the error the judgment must have been reversed, though, if justice required, another which would have been valid might have been entered. In that case, the parties to the judgment sought to be reversed were before the court, and the process pending was such as to authorize the court to do that between them which the law and justice required. In the judgment relied upon in the case at bar, the error has not been released, the parties to it are not before the court, and no process is pending which can give the court any authority to modify or change it in any respect, or substitute a new one in its place. We must take this judgment, or pretended judgment, as it now stands, without addition or diminution, and upon principle as well as authority it is erroneous.

That the respondent in this process, not being a party or privy to that judgment, may avail himself of any illegality in it, is well settled: *Vose v. Morton*, 4 Cush. 27 [50 Am. Dec. 750], and cases cited; *Caswell v. Caswell*, 28 Me. 237.

Bill dismissed, with costs.

KENT, WALTON, BARROWS, and TAPLEY, JJ., concurred.

JUDGMENT IN ACTION ON JOINT CONTRACT IN FAVOR OF ONE DEFENDANT DISCHARGES DEFAULTED CO-DEFENDANT, if the former goes to trial on a defense common to both defendants, but not if the defense is personal to himself: *Swansey v. Parker*, 88 Am. Dec. 549.

ONE NOT PARTY TO JUDGMENT CANNOT BE INJURIOUSLY AFFECTED THEREBY: *Brush v. Fowler*, 85 Am. Dec. 383; and see *Hovey v. Chase*, 83 Id. 514.

JUDGMENT OF COURT HAVING NO JURISDICTION either of the person or the subject-matter is void: *Butcher v. Bank of Brownsville*, 83 Am. Dec. 446; and judgment may be attacked either directly or collaterally for want of jurisdiction: *Wallace v. Brown*, 76 Id. 421.

JUDGMENTS ARE BINDING ONLY UPON PARTIES AND PRIVIES: *Detrick v. Migatt*, 68 Am. Dec. 584; *Lipscomb v. Postell*, 77 Id. 651, and cases collected in note 658.

CIRCUMSTANCES UNDER WHICH JUDGMENT MAY BE COLLATERALLY IMPRACHED by one not a party or privy: *Sidensparker v. Sidensparker*, 83 Am. Dec. 527, and cases collected in note 533.

JUDGMENT AGAINST ONE OF SEVERAL JOINT DEBTORS BARS ACTION against the others: *Snydam v. Barber*, 75 Am. Dec. 254.

JUDGMENT AGAINST ALL OF SEVERAL DEFENDANTS, WHEN PART ONLY WERE SERVED with summons, is void as against all of them: *Hulme v. Jones*, 55 Am. Dec. 774; and compare *Raney v. McRae*, 60 Id. 660; *Douglass v. Masie*, 47 Id. 375; *Nelson v. Bostwick*, 40 Id. 310; *Winchester v. Beardlin*, 51 Id. 702; *Wood v. Atkinson*, 44 Id. 562; *St. John v. Holmes*, 32 Id. 603, and note 604.

THE PRINCIPAL CASE IS DISTINGUISHED in *Blaisdell v. Pray*, 68 Me. 274.

HUNT v. COLUMBIAN INSURANCE COMPANY.

[55 MAINE, 280.]

DISSOLUTION OF FOREIGN CORPORATION DURING PENDENCY OF SUIT AGAINST, EFFECT OF. — An action against a foreign corporation, having an agency in the state where the action is commenced, is not prevented from proceeding to judgment by a subsequent decree dissolving the corporation and appointing receivers to wind up its affairs, made in the state of its creation, unless it is shown that the corporation is utterly extinct.

LEGAL AUTHORITY OF RECEIVERS DULY APPOINTED IS CO-EXTENSIVE only with the jurisdiction of the court by whom they were appointed.

STATE COMITY DOES NOT REQUIRE COURTS OF ONE STATE to permit receivers, appointed by the court of another state, to exercise privileges detrimental to the citizens of the former, while pursuing appropriate legal remedies there.

ASSUMPSIT on an account annexed and on a count for money had and received. The opinion states the case.

W. L. Putnam, for the plaintiffs.

Davis and Drummond, for the receivers and principal defendant.

By Court, BARROWS, J. In both these cases the plaintiffs are resident citizens of this state, as are also the parties who are summoned as trustees of the principal defendant, a corporation located, at the time of the commencement of the action, in the city of New York, and doing an extensive business in the taking of marine risks here, by means of its agents.

In the first-named case, which was entered at the April term, 1866, the trustees appeared at the return term and filed their disclosure, admitting a considerable amount of funds in their hands, which they said was claimed by the receivers of the insurance company; and the defendant corporation also appeared by respectable and well-known counsel, members of this bar, and there was a continuance to the October term, previous to which the principal defendant regularly filed specifications of defense, and the cause was thereupon continued from

term to term to the April term, 1867, when the principal defendant was defaulted, and the receivers appeared and filed their claim to the moneys of the company in the hands of the trustees, put in copies of the proceedings in the New York supreme court, showing a decree of dissolution of the Columbian Insurance Company, and the appointment of receivers, February 6, 1866, within a month after the attachment of the funds of the company in the hands of these trustees. The plaintiff thereupon put in certain extracts from the statutes of the state of New York, and the case was reported to this court upon the stipulation that the trustees should be charged for \$2,382.30, less their costs, unless, upon the matters appearing in the report, the claim of the receivers should prevail, or unless, by reason of the proceedings in the New York court, the plaintiffs are precluded from taking judgment in this suit against the principal defendant.

1. As to the effect of the judgment in New York upon the *status* of the corporation, which is the principal defendant here, and consequently upon the right of the plaintiff to pursue this action to final judgment, it is plain that we should have had a materially different question presented for our decision, so far as this point is concerned, if the effect in New York were what is claimed for it here.

But certainly such judgment cannot have any greater force or effect here upon the condition and existence of the corporation than it has by law in the state where it is rendered. The utmost that can be required in this respect is, that the records or judicial proceedings there, duly authenticated, shall have such faith and credit given to them here as they have by law or usage in the courts of the state from whence they are taken. Such is the tenor of the act of Congress, passed May 26, 1790, section 1, in pursuance of the power given by the first section of the fourth article of the constitution of the United States.

To substantiate the position that the plaintiff cannot take judgment in this suit against the Columbian Insurance Company, whose credits were duly attached in the hands of the trustees, and who appeared and answered, and filed their specifications of defense, and subsequently submitted to a default, it must be shown that the corporation is not merely prohibited from the customary exercise of its corporate functions, but is actually extinct. It is not merely a perpetual paralysis, but an unqualified dissolution alone, that can defeat the plaintiff's right to a judgment. If by law or usage in the courts of the

state of New York, where the judgment was rendered, the corporation may still be a party of record, and suits maintained or defended in its name, though its affairs there are under the guardianship of the servants of the court, it must be considered as having a qualified existence so long as judgments can be rendered for or against it in the courts of that state.

Looking now to the extracts from the laws of New York, which are made part of the case, we find many provisions which seem to recognize the existence of a corporation, in favor of and against which suits may be prosecuted and judgment rendered after the passage of the decree for what must be deemed only a *quasi* dissolution, which is entered at an early stage of the proceedings, in order to prepare the way for certain proceedings against the stockholders, which can only be had after such decree. But notwithstanding such decree, it seems judgment may still be rendered in pending suits for or against the corporation, as well as in suits in favor of or against the receivers appointed by the court; in certain cases moneys are to be retained in the hands of the receivers, to be applied according to the event of the suit, or otherwise distributed on a second or third dividend (Rev. Code N. Y., vol. 2, p. 492, secs. 78, 84), and finally (vol. 3, p. 674, c. 295), by section 4, it appears that "the court in which any suit or proceeding against a corporation which shall have been dissolved by the decree of the court of chancery, or by the expiration of its charter, or otherwise, shall be pending at the time of such dissolution, shall have power, on the application of either party thereto, to make an order for the continuance of such suit or proceeding, and the same may be thereafter continued until a final judgment or decree shall be had therein, which shall have the like effect upon the rights of the parties as if such corporation had not been dissolved."

The dissolution of the Frankfort Bank, which was under consideration in the cases of *Merrill v. Suffolk Bank*, 31 Me. 57 [50 Am. Dec. 649], and *Rankin v. Sherwood*, 33 Id. 509, cited for claimants, reaffirming *Reed v. Frankfort Bank*, 23 Id. 318, and *Whitman v. Cox*, 26 Id. 335, was effected by an act of the legislature passed March 29, 1841, repealing the charter, and followed April 16, 1841, by an additional act requiring all creditors to present their claims to the receivers, and make proof of them on or before the first day of July, 1842, on pain of being forever barred. The corporation in that case was utterly extinguished; a different remedy was

provided for creditors, and it was rightly held throughout the subsequent litigation that judgments rendered against the bank after such a dissolution were erroneous.

In *Leathers v. Shipbuilders' Bank*, 40 Me. 386, in place of such provisions as we have above recited from the statutes of New York, we find assigned as one of the grounds of the decision the statute of March 16, 1855, expressly forbidding the maintenance of any action against a bank after the appointment of receivers.

It is manifest that these decisions throw little light upon the effect produced upon the *status* of the Columbian Insurance Company by the decree of the court in New York.

Looking at the statutes of New York to ascertain the effect which it has by law and usage in the courts of that state, we find no difficulty in concluding that there is nothing in those proceedings to prevent the plaintiff from taking judgment in this suit against the principal defendant as a corporation still having a qualified existence, though permanently disabled. Like the apocalyptic church in Sardis, when its existence was recognized, and it was addressed in the language of reproof by the apostle, though in some sort it may be said to be dead, "it has a name to live"; and for the furtherance of justice, it is best to "strengthen the things that remain that are ready to die."

2. But hereupon, it is argued for the claimants, with not a little plausibility, that if the corporation is not completely defunct, so that no judgment can be rendered against it, it is kept alive by allowing the remedial laws of New York to operate here, and that if they operate here for one purpose, they do for all; if their effect is to give authority to prosecute cases against the corporation, it must be through the receivers; and if the receivers, as such, can be prosecuted here, they must be entitled to the funds in the hands of the trustees, the act that created them giving them title to the funds. At the first glance, this seems but reasonable; but the fallacy creeps in with the assumption that it is only by giving a positive force and operation to the laws of New York here that the action can be maintained against the principal defendant. Not so. The problem stands thus: Given, a corporation actually transacting business in this state, appearing and answering generally to this suit: the question which we have just been considering is, whether the judgment introduced by the claimants had the effect to annihilate the corporation there. Find-

ing that it still has sufficient vitality by law and usage in the courts of New York to be capable of being a party to a judgment there, we have only to answer that question in the negative, and we are left with the presumption arising from the proceedings in our own court in this suit unimpaired. Another, and as it seems to us, notwithstanding the ingenious argument of the claimant's counsel, a totally distinct, question is now presented.

The plaintiff, by the service of his trustee process upon the debtor of the principal defendant, has obtained a lien upon the debt, and upon the disclosure is entitled to an adjudication in his favor against the parties summoned as trustees of the Columbian Insurance Company, unless the appointment of receivers in New York has transferred to them the right to control, not only the property of the defendant corporation there situated, but also that which is within our own jurisdiction, in such a manner as to defeat the plaintiff's previously acquired lien. That an actually subsisting lien, regularly acquired by proceedings in a court of competent jurisdiction, cannot be thus defeated, seems too plain to require argument or elucidation, and even the claimant's counsel prudently declines any futile attempt to support the claim of the receivers, except in the indirect mode before adverted to. The receivers who assert this claim here are merely the servants of the court in New York, having legal authority co-extensive only with the jurisdiction of the court by whom they were appointed. Upon principles of comity, often recognized and always acted on, except when they come in conflict with paramount rights of suitors in our courts, they might be admitted here to protect the interests and enforce the claims of the corporation, of whose affairs they are the legal guardians there. But comity does not require us to permit the exercise of such privileges to the detriment of our own citizens who are pursuing appropriate legal remedies in this court.

Chancellor Kent declares that "it may now be considered as part of the settled jurisprudence of this country, that personal property, as against creditors, has locality, and the *lex loci rei sitæ* prevails over the law of the domicile, with regard to the rule of preferences in the case of insolvent's estates. The laws of other governments have no force beyond their territorial limits; and if permitted to operate in other states, it is upon a principle of comity, and only when neither the state nor its citizens would suffer any inconvenience from the

application of the foreign law." See Kent's Commentaries, 4th ed., 406, where the strong current of American authorities sustaining the doctrine, that even "a prior assignment in bankruptcy under a foreign law will not be permitted to prevail against a subsequent attachment (by an American creditor) of the bankrupt's effects found here," is passed in review, and cases arising in the courts of the different states and of the United States are cited to show that "our courts will not subject our citizens to the inconvenience of seeking their dividends abroad, when they have the means to satisfy them under their own control."

If an assignment by the creditor himself in conformity with the laws of another state, or a transfer to assignees in the regular course of foreign proceedings in bankruptcy, cannot avail to prevent a creditor here from pursuing his remedy against property found within this jurisdiction and subsequently attached, there is plainly no ground whatever for the claim that a prior attachment shall be vacated at the instance of receivers appointed in New York upon summary proceedings like those in the record before us in this case. Such an exercise of comity could neither be expected nor desired.

The view which we have taken of the points raised in the case first above named enables us to dispose of both cases without adverting to the particulars wherein the disclosures filed by the trustees in Chase's suit differ from the others. The same result must necessarily follow in the second case, and it is unnecessary to give any opinion upon the points raised and argued by counsel therein, as distinguished from the case of Hunt against the same defendants.

Holding as we do that the proceedings of the court in New York did not operate an extinction of the defendant corporation, and cannot prevent the plaintiff from proceeding to judgment against it in a suit commenced here before those proceedings were instituted, and that the claim of the receivers appointed there cannot prevail to defeat the lien previously created by the service of the writ here, the proper entry in both cases will be, trustees charged on disclosure for sum indicted in report.

Judgment for plaintiff.

APPLETON, C. J., and KENT, WALTON, DANFORTH, and TAPLEY, JJ., concurred.

FOREIGN CORPORATIONS, ACTIONS BY AND AGAINST: See *Connecticut etc. R. R. Co. v. Cooper*, 73 Am. Dec. 319; *McCluer v. Manchester etc. R. R.*, 74 Id. 624; *Mineral Point R. R. Co. v. Keep*, 74 Id. 124; *March v. Eastern R. R. Co.*, 77 Id. 732; *Allegheny County v. Cleveland etc. R. R. Co.*, 88 Id. 579.

RECEIVER OF CORPORATION, APPOINTMENT OF: *Cortelyou v. Hathaway*, 64 Am. Dec. 485, note; *Potter v. Merchants' Bank*, 86 Id. 273; suit by receiver of foreign corporation: *Peterson v. Chemical Bank*, 88 Id. 298.

COMITY DOES NOT REQUIRE state to enforce foreign laws derogatory to its own, or violating vested rights: *McLean v. Hardin*, 69 Am. Dec. 740; *Kanaga v. Taylor*, 70 Id. 62; *Walters v. Whitlock*, 76 Id. 607; *Roche v. Washington*, 81 Id. 376.

STATE MAY REFUSE TO RECOGNIZE FOREIGN CORPORATION EXCEPT UPON ITS OWN CONDITIONS: *Erie Ry Co. v. State*, 86 Am. Dec. 228.

COBB v. CITY OF PORTLAND.

[55 MAINE, 381.]

ACTION CANNOT BE MAINTAINED AGAINST CITY FOR PERSONAL INJURY sustained by one while aiding its police officers, at their request made in accordance with a city ordinance, in arresting violent disturbers of the peace.

ACTION for a personal injury. Defendants' demurrer to the declaration was sustained, and the plaintiff alleged exceptions. The opinion states the facts.

F. O. J. Smith and B. D. Verrill, for the plaintiff.

Davis and Drummond, for the defendants.

By Court, DICKERSON, J. This is a case of novel impression, and involves an important principle. A police officer of the city of Portland, by authority of a city ordinance, the validity of which is not controverted, called upon the plaintiff to aid him in arresting certain turbulent persons who were disturbing the public peace. The plaintiff obeyed the summons, and was severely injured by one of them while in the performance of that service. The question to be determined is, whether the plaintiff has a remedy against the city of Portland for such injury.

As the statute does not expressly provide a remedy against the city in such case, such liability, if any there be, must be founded in tort or contract.

It is not claimed that the city committed any tort in passing the ordinance, or the policeman in applying it. Nor was there an express contract of indemnity. Was there an implied one?

Assuming that, by consenting to perform the service, as requested (for it was optional with him whether to do so or subject himself to a small fine), the plaintiff became the agent or servant of the defendant, would the defendant be liable for the injury complained of? While it is true, as argued by the counsel for the plaintiff, that an agent or servant in certain cases is entitled to full compensation for any pecuniary losses he may sustain in the course of his employment, without fault on his part, it is otherwise in respect to compensation for personal injuries received in such service.

The master is not responsible for any accident happening to his servant in the course of his service, unless the master knew that it exposed the servant to peculiar danger, and the servant did not. The general rule governing the relation between master and servant in this respect is, that the servant takes upon himself the natural and ordinary risks and perils incident to the performance of such service, and the law presumes that the contract is adjusted upon this principle. This doctrine has been carried so far as to exonerate the master from liability for an injury to one servant, received in consequence of the carelessness of another engaged in the same service, when he has used due diligence in the selection of competent and trusty servants, and furnished them with suitable means to perform the service in which they are employed: *Buzzell v. Laconia Mfg. Co.*, 48 Me. 113 [77 Am. Dec. 212]; *Priestly v. Fowler*, 1 Mees. & W. 1; *Braun v. Maxwell*, 6 Hill, 594; *Farwell v. Boston and Worcester R. R. Co.*, 4 Met. 57 [38 Am. Dec. 339].

The demand for assistance advised the plaintiff of the turbulence of the disturbers of the peace, and the risk he ran in attempting to arrest them. There is no pretense that the nature or the extent of the danger was concealed from him, or that he did not comprehend them both as fully as the officer. If therefore the plaintiff, in consenting to render the service requested, became the agent or servant of the city of Portland, he has no legal claim upon it for indemnity, upon the principles of the authorities cited.

But the plaintiff was not the agent or servant of the city of Portland; nor was the policeman whom he assisted. Both were acting under the authority of the state as the conservators of the public peace, the peace of the state, not the peace of the city of Portland alone. It is true, they derived their authority immediately from the city of Portland, but that was

done by act of the legislature as a matter of convenience. While engaged in the service stated, they represented the authority and dignity of the state, and not that of the city of Portland merely. The obligation devolved by statute upon the city of Portland to appoint police officers, in order to promote the general welfare and preserve the peace of its inhabitants or the community, confers no particular interest, benefit or advantage upon it in its corporate capacity, and creates no liability on its part for the acts of these officers. Nor does it *a fortiori* insure the safety of their persons by indemnifying them against any personal injuries they may receive from others, or from the accidents that may befall them in the discharge of their duty. If such officers have any claim for compensation for such injuries, it rests on moral grounds, and is more properly addressed to the legislature than to a judicial tribunal: *Fox v. Northern Liberties*, 3 Watts & S. 103; *Buttrick v. Lowell*, 1 Allen, 172 [79 Am. Dec. 721].

Even municipal officers proper, who are not intrusted with the preservation of the public peace, are not the agents or servants of the cities or towns by whom they are chosen, rendering their principals liable for their acts as such. The liabilities of municipal corporations are fixed by statute, and do not depend upon any so uncertain contingency as the conduct of their officers. For such liabilities alone have they authority to raise money: *Small v. Inhabitants of Danville*, 51 Me. 360; *Mitchell v. Rockland*, 52 Id. 118.

The doctrine of liability on account of "a compulsory agency without hire," ingeniously suggested by the counsel for the plaintiff, but unsupported by authority, does not relieve the plaintiff's case from these difficulties. There was no physical compulsion. If compulsion there was, it was a moral compulsion, arising from the alternative of compliance or liability to a small pecuniary fine. But this alternative, as we have seen, was presented by authority of the state, and not the defendant. There is no ground, either at common law or by statute, upon which this action can be maintained.

Exceptions overruled.

Judgment for the defendant.

KENT, BARROWS, DANFORTH, and TAPLEY, JJ., concurred.

CITY IS NOT LIABLE AT COMMON LAW TO ONE WHOSE PROPERTY HAS BEEN INJURED by a mob within its limits: *Prather v. City of Lexington*, 54 Am. Dec. 585, and note 589.

CITY IS NOT LIABLE FOR ASSAULT BY POLICE OFFICER in attempting to enforce ordinance; *Buttrick v. Lowell*, 79 Am. Dec. 721; and see *City Council v. Gilmer*, 70 Id. 562; *Mitchell v. Rockland*, 66 Id. 252.

THE PRINCIPAL CASE IS CITED to the point that the city marshal is essentially a state officer, and the people of the whole state are interested to have such legislation and judicial interpretation as to his appointment, tenure, and removal as will secure the most efficient administration of his office, in *Andrews v. King*, 77 Me. 230.

HILL v. PORTLAND ETC. RAILROAD COMPANY.

[55 MAINE, 488.]

RAILROAD COMPANY HAS RIGHT TO ESTABLISH REASONABLE SIGNALS FOR STARTING TRAINS from its stations; but it is the province of the jury to determine, upon the circumstances of the particular case, whether the loud and sudden sounding of a steam-whistle was a reasonable signal for such purpose, and within the rule of ordinary care.

MAXIM, SO USE YOUR OWN PROPERTY AS NOT TO INJURE THE RIGHTS OF ANOTHER, applies to corporations as well as to individuals.

IT IS COMPETENT FOR PLAINTIFF IN ACTION FOR PERSONAL INJURY, CAUSED by the fright of his horse at the sound of a locomotive whistle at a railroad crossing, to show that the sound of the whistle frightened other horses at the same time and place, and also to show the usual effect of that whistle on ordinary horses at the same place.

WITNESS OF LONG RAILROAD EXPERIENCE CANNOT BE ALLOWED TO GIVE HIS OPINION whether the loud and sudden sounding of a steam-whistle was, under all the circumstances of the particular case, reasonable and prudent, or otherwise; nor is it competent to ask him whether or not similar signals were given by other railroad companies.

GENERALLY OF CUSTOM WHICH IS UNREASONABLE or dangerous, and productive of injury, cannot in any degree excuse an act done in conformity to it.

CASE for personal injury to the plaintiff, in consequence of his horse being frightened at the loud and sudden blowing of a locomotive whistle at a railroad crossing near a station. The verdict was for the plaintiff, and the defendants alleged exceptions. The facts more fully appear in the opinion.

Deane and Verrill, for the defendants.

Chisholm and E. B. Smith, for the plaintiff.

By Court, KENT, J. The defendants move for a new trial, on the ground that the verdict is against evidence and the weight of evidence. On a careful examination of the evidence as reported, we think there was evidence from which a jury might find these facts, viz.: that the plaintiff, driving a quiet and safe horse, stopped near the crossing because the train

was at the depot and apparently about to start, and he did not think it prudent to attempt to pass over the track, the head of the engine being fifteen or twenty feet only from the highway at the crossing; that the time of stopping the train at the depot was irregular, sometimes ten or fifteen minutes, and sometimes the train making but a momentary stop; that in this condition of things, the engineer, according to the custom then on this road, sounded the whistle twice, very suddenly, and the sounds were very loud and sharp and brief; that these sounds alarmed plaintiff's horse very much, and he suddenly turned and threw the plaintiff out of his carriage, who, by his fall and the consequences resulting from it, suffered injury and damage to his person; that the engineer was in a situation to see the plaintiff and his horse before he sounded the whistle; that it was sounded before the train started.

There was evidence in some degree qualifying, or perhaps contradicting, some of these positions; but it seems to us that a jury might honestly find them to be true on the whole evidence. If so, then the verdict for plaintiff can only be set aside by establishing one of the following positions: that the engineer had a legal right to sound the whistle as he did, and that the company would not be responsible for the act under any circumstances; or that under the circumstances of this case it was proper and prudent, and not exceeding the rule of ordinary care for him to do what he did; or that the plaintiff contributed to the accident and injury by his own want of reasonable prudence and ordinary care on his own part.

As to the first proposition, we do not find any specific ruling reported in the exceptions except the following: "That the mere fact that such a rule of blowing the whistle as had been testified to had been established and practiced for a year or more by this company, does not operate as a justification in this case, if it was an unreasonable, unauthorized rule, and an infringement of the plaintiff's rights."

The exceptions state that other rulings not excepted to were given.

A railroad company has an undoubted right to establish rules and regulations in reference to the mode and manner of giving notice at stations or other places. It is right and proper that sufficient notice should be given to passengers that the train is about to start. But all such rules must be subjected to the test of reasonableness, in view of the rights and

duties of citizens who may be affected by them. No corporation can rightly disregard these rights, when adopting its own rules of action, or giving directions to its servants or agents. The great maxim of *Sic utere tuo*, etc., applies to corporations as to individuals: *Shaw v. Worcester R. R.*, 8 Gray, 66. A mode of giving notice, for instance, may be convenient and save some labor, and may answer well all the purposes of the company, and yet may be used at some time or place when it is liable to cause damage, whilst at some other time or place it would not be subject to such objection. It might be safe and prudent to sound a loud and sudden whistle at a station, at a distance from any highway or crossing, when it would not where there was such crossing with many horses near it, awaiting the passing of the engine and train. We cannot sanction the claim of any railroad to establish and execute its own rules at its own pleasure, without reference to others' rights and privileges.

The whistle seems to be particularly adapted to give notice of the approach of a train to a crossing of a highway. The object, then, is to warn all persons of such approach in season to enable them to stop at a safe distance, and thus avoid the risk of collision and of alarm to horses. Indeed, the law requires that such notice shall be given by bell or whistle. Of course, no railroad company can be held liable for damages for giving such notice as is required by law when given at the distance named in the statute. The company may be liable for the damages occasioned by a neglect of this duty. But the statute does not authorize or require the sounding of the whistle at any other time or place. The right or liability at other times and places depends upon the general principles of law, as before explained, applicable to the particular facts in each case.

In every case, then, it becomes a question whether in that particular case the act was reasonable and within the rule of ordinary care, under all the circumstances of time and place, and all the surroundings. It would seem that there may be a decided difference in "whistles" in their suddenness, loudness, and brevity, and consequently in their liability to alarm horses. Again, reasonable care might require of the engineers to look ahead to see if any horses are on or near the track, particularly when near to a highway which crosses the railroad immediately in front of the engine, and to abstain from the use of the whistle and resort to his bell if he sees

any animal within twenty feet and in front of his engine. There can be no doubt, we presume, that the ringing of the bell is the safest, and usually the best understood, notice to passengers that the train is about to start.

We do not mean to decide that a whistle can never properly be used for this purpose, although the use of a bell for this particular purpose seems less liable to objection. But it is a question in every case for the jury to decide, whether in the case before them its use was justifiable, or prudent, or proper. We cannot doubt that proper instructions were given by the court on this point, and we see no sufficient reasons for setting aside the verdict on this ground.

The other point on which the motion rests is, that the plaintiff contributed to the injury by his own want of care and prudence. It is urged that he might have crossed the road and gone beyond danger of alarm, after he arrived at the place where he stopped. The answer to this is, that the time when the train would start was not regular or fixed, but quite uncertain. It is said he did actually start to go over an instant before the whistle sounded, and that this was want of care, and contributed to the injury. If the injury had arisen from a collision between his horse and carriage and the engine, this fact would be of more importance, and might go far to show a want of care. But there was no collision. The horse was frightened. And it might be fairly urged that he would have been equally alarmed if he had stood still where he was a moment before. He could not have moved many feet from that spot. At all events, all these facts and circumstances were before the jury, and their decision is not, in our view, manifestly wrong on the evidence. There are no exceptions to the law as given to the jury on this part of the case. The exception taken to the question proposed to S. L. Hill cannot be sustained. This witness was on the spot with his own horse. It was competent, clearly, for the plaintiff to show that the whistle produced the same effect on his horse that it did on plaintiff's horse. This was pertinent to the issue, and bore directly on the nature, extent, and actual effect of the noise made by the defendants' engine.

A witness for plaintiff was asked by him, in reference to the whistle on this road at this place, "What is the usual effect of this on ordinary horses?" This question was objected to, but admitted. The witness answered: "I have seen a great many horses frightened by it." It is stated in the exceptions that

no answer given to any question objected to was made on the ground of not being responsive to the question, or as being more objectionable otherwise than the inquiry, nor was any request made concerning the same. Was it competent for the plaintiff to show the usual effect of this whistle on horses of ordinary character. Why not? One leading question in the case was, whether it was reasonable for the engineer to apprehend or suppose that the noise suddenly made would frighten horses. In other words, it was competent to show to the jury, some of whom might never have heard such a whistle, the nature, extent, and all the characteristics of the sound emitted, and its effects on horses of ordinary steadiness. We think the defendants might have proved, if they could, that the whistle had been in use for years, and that no horse had ever been alarmed by it. And so, as bearing on the same points, the plaintiff might show what effect had actually been produced by it on the horses. The objection is restricted to the question. If there was any objection to the answer, it should have been made specially, and the exceptional part might have been stricken out, or if not, been excepted to. The question was not as to the usual effect of railroad whistles, but what the effect of this particular whistle at this place had been within the knowledge of the witness. We think the question admissible, within the rules of evidence.

The questions put to S. T. Corser, and objected to by plaintiff, and excluded, related chiefly to the witness's opinion and judgment, whether the blowing of the whistle was safe and prudent. He was asked whether, in his opinion, this practice on this road was "reasonable or unreasonable," "prudent" or "extraordinary," or "an reasonable manner of proceeding on the part of the engineer." It is very clear that these questions were inadmissible. They proposed to obtain from the witness answers to questions which the jury were to answer, where the facts were of a character equally within the knowledge and comprehension of the jury as of the witness. They ask for mere naked expressions of opinion as to the character and quality of acts open to common observation: *Mulry v. Mohawk Valley Ins. Co.*, 5 Gray, 541 [66 Am. Dec. 380].

This witness was also asked whether it was not a custom on other railroads to blow two whistles upon starting the train, the witness having stated that he was acquainted with the customs of railroads generally, and that he had been in charge of one sixteen years. This was also excluded. It

does not appear in terms whether the object was to prove a general custom on all railroads. The question might be limited to one or two roads. But if such a general custom could be established, it would not be a legitimate defense in this case, or tend to establish it. If all the railroads in the country adopt any rule or custom which is unreasonable or dangerous, and productive of injury, the generality of the custom cannot in a given case in any degree excuse or justify the act. Every case must be determined upon its facts, and not upon the proceedings of other corporations in somewhat similar cases: *Miller v. Pendleton*, 8 Gray, 547.

Exceptions and motion overruled.

WALTON, DICKERSON, DANFORTH, and TAPLEY, JJ., concurred.

DUTY OF RAILROAD COMPANY TO PROVIDE WARNING OF DANGER AT CROSSINGS: *Wakefield v. Conn. etc. R. R. Co.*, 86 Am. Dec. 711, and cases collected in note 715.

RAILROAD COMPANIES ARE LIABLE TO STRANGERS for failure of their agents to exercise ordinary care and skill in operating trains: *Louisville etc. R. R. Co. v. Collins*, 87 Am. Dec. 486, and cases collected in note 492.

IN CASE OF CONFLICTING EVIDENCE ON QUESTION OF NEGLIGENCE, the jury have a right to decide the character of the evidence: *Louisville etc. R. R. Co. v. Collins*, 87 Am. Dec. 496; and see *Zemp v. Wilmington etc. R. R. Co.*, 64 Id. 763.

APPLICATION OF MAXIM, So use your own property as not to injure the rights of another: *Stinson v. New York Cent. R. R. Co.*, 88 Am. Dec. 332.

EVIDENCE OF USAGE OR CUSTOM, when admissible: *Barlow v. Lambert*, 65 Am. Dec. 374; *Cox v. Peterson*, 68 Id. 145; *Governor v. Withers*, 50 Id. 99; *Steele v. McTyer*, 70 Id. 516; *Farnsworth v. Hemmer*, 79 Id. 756; *Boon v. Steamboat Belfast*, 88 Id. 761.

FILLEBROWN v. GRAND TRUNK RAILWAY COMPANY.

[55 MAINE, 462.]

COMMON CARRIERS ARE REGARDED AT COMMON LAW AS INSURERS OF GOODS DELIVERED TO THEM FOR TRANSPORTATION, except when their loss is occasioned by the act of God or the public enemy.

COMMON CARRIERS MAY RESTRICT THEIR COMMON-LAW LIABILITY by notice brought home to the owner of goods before or at the time of delivery to them, if such notice be assented to expressly or impliedly by the owner.

NOTICE RESTRICTING CARRIER'S COMMON-LAW LIABILITY, GIVEN TO PERSON who was simply directed by the owner to deliver the goods to the carrier, is insufficient to bind the owner, in the absence of all knowledge of and assent to such notice on the part of the latter.

OWNERS OF GOODS ARE PRESUMED TO CONTRACT WITH CARRIERS UNDER THEIR COMMON-LAW LIABILITY, and it is for the carrier to show any qualification of his responsibility.

CASE, to recover for the loss of goods delivered to the defendants as common carriers. On the back of the receipt given by the defendants' agent for the goods was the following notice: "The Grand Trunk Railway Company give public notice that they will not be responsible for damages from the weather, fire, heat, frost, etc." Other material facts appear in the opinion. Defendants agreed to submit to a default, provided the full court, upon the evidence, should be of the opinion that the default should stand; otherwise the plaintiff to be nonsuit.

S. and J. W. May, for the plaintiff.

Phineas Barnes, for the defendants.

By Court, APPLETON, C. J. The defendants are common carriers. By direction of the plaintiff, on the 18th of October, 1865, one hundred barrels were left with the defendants at their depot in Detroit, Michigan, to be by them transported from thence to a designated place of destination. The defendants received them in charge for that purpose. Within one or two hours after they were so left, the depot in which they were deposited was burned without fault on the part of the defendants. By the common law, the common carrier being regarded as an insurer, except when the loss is by the act of God or the enemies of the government, the defendants are responsible.

The defendants seek to avoid their common-law liability by reason of notice and a special contract limiting and restricting their responsibility. It has been finally settled, after much fluctuation of judicial opinion, that carriers may restrict their general liability by notices brought home to the owner of the goods before or at the time of delivery to the carrier, if assented to expressly or impliedly by the owner.

The legal presumption, in the absence of all proof, is, that the owners of goods contract with the carrier under their common-law liability. It is for the carrier to show any qualification of his responsibility.

The case shows that the plaintiff purchased the barrels in question of one F. A. Stokes on the 17th of October, and on the same day called on the agent of the defendants, with

whom he verbally arranged for the price of transportation. The agent testified, "the only contract which was made was at the stipulated rate. It was verbal." The agent gave no notice of any special terms or any restrictions upon the general liability of his principals as common carriers. The plaintiff therefore was justified, in the absence of any notice, in presuming that the defendants would carry his goods subject to all the responsibilities incident to their vocation. "In all cases where the notice cannot be brought home to the person interested in the goods, directly or constructively, it is a mere nullity; and the burden of proof is on the carrier to show that the person with whom he deals is fully informed of the terms and effect of the notice": Angell on Carriers, sec. 247, and cases cited; *Simons v. Great Western R'y Co.*, 2 Com. B., N. S., 620; S. C., 89 Eng. Com. L. 619.

Where by a memorandum on a receipt for baggage issued by an express company it was stated that the "liability" of the company was "limited to one hundred dollars, except by special agreement to be noted" thereon, it was held that, in the absence of any knowledge by the owner of the baggage of such condition, there was no consent to it by him, and no bargain between the parties limiting the liability of the company: *Limburger v. Westcott*, 49 Barb. 283.

A carrier cannot by a general notice exonerate himself entirely from his legal duty and liability for property delivered him for transportation, or fix the amount beyond which he will not be responsible in case of injury or loss. "It would, in effect," observes Bigelow, C. J., in *Judson v. Western R. R. Corp.*, 6 Allen, 486, "put it in the power of the carrier to abrogate the rules of law by which the exercise of his employment is regulated and governed. Certainly, such a notice, even if shown to have been within the knowledge of the owner of the goods, would, in the absence of evidence of his direct assent to its terms, afford no sufficient ground for the inference that he had voluntarily agreed, without any consideration, to relinquish and give up the valuable right of having his goods carried at the risk of the carrier. On the contrary, it would be quite as reasonable to infer, under such circumstances, that the carrier did not intend to rely upon a notice upon which he could not legally insist, as that the owner of goods meant to surrender a right to which he was entitled by law. In such case, mere silence cannot be said to amount to acquiescence."

The plaintiff, after his conversation with the defendants' freight agent, directed the clerk of Stokes, of whom they were purchased, to send the barrels to the defendants' depot, informing him that he had made an arrangement with them as to their delivery, but giving him no authority to act in any way for him. Nor does the evidence show that he did any act whatever as the agent of the plaintiff; but that if he signed any paper, it was as the agent of Stokes, who had ceased to have any interest in the barrels to be transported.

The only question remaining is, whether, upon the facts disclosed, Chamberlain, the clerk of Stokes, had any authority from the plaintiff to exonerate the defendants from their general liability as common carriers.

It is for the defendants to show he had such authority. The barrels were the plaintiff's. The defendants' agent was aware of that fact. The clerk of Stokes had no authority, express or implied, to do any act for the plaintiff except to send the goods to the defendants' depot. The clerk could not bind the plaintiff, and did not attempt to. Acting only for Stokes, his signature as his agent, the defendants were aware, could not affect the rights of the plaintiff. Whether the consignor of goods, or the person depositing them with the carrier, has authority to contract, on the part of the consignee, being the owner or party interested in the transportation, for exemption of the carrier from his ordinary responsibility, is in each particular case a question of fact depending upon its special and peculiar circumstances, and to be determined by the jury: *American Transportation Co. v. Moore*, 5 Mich. 368.

"It is no longer open to controversy in this state," observes Bigelow, C. J., in *Buckland v. Adams Express Co.*, 97 Mass. 125, "that a carrier may limit his responsibility for property intrusted to him by a notice containing reasonable and suitable restrictions, if brought home to the owner of goods delivered for transportation, and assented to clearly and unequivocally by him. It is also settled that assent is not necessarily to be inferred from the mere fact that knowledge of such notice on the part of the owner or consignee of goods is shown. The evidence must go further, and be sufficient to show that the terms on which the carrier proposed to carry the goods were adopted as the contract between the parties, according to which the service of the carrier was to be rendered." In the present case, we think Chamberlain had no authority, express or implied, from the plaintiff to relieve the

defendants from their legal responsibility as common carriers.

Default to stand.

KENT, DICKERSON, BARROWS, and DANFORTH, JJ., concurred.

WALTON, J., did not concur.

COMMON CARRIER IS RESPONSIBLE FOR LOSS OF OR INJURY TO GOODS intrusted to him for transportation, unless the loss or injury results from the act of God or the public enemy: *Michaels v. N. Y. Cent. R. R. Co.*, 86 Am. Dec. 415, and cases collected in note 426; *Read v. Spaulding*, 86 Id. 426; *Hooper v. Wells etc.*, 85 Id. 211; *Bland v. Adams Ex. Co.*, 85 Id. 623; *Arnold v. Jones*, 82 Id. 617.

COMMON CARRIER MAY SPECIALLY CONTRACT WITH EMPLOYER FOR PARTIAL OR TOTAL EXEMPTION from his common-law liability as an insurer of property committed to his custody: *Baltimore etc. R. R. Co. v. Rathbone*, 88 Am. Dec. 664; *Ill. Cent. R. R. Co. v. Smyser*, 87 Id. 301, and cases collected in note 304; and a notice by the carrier to this effect, if brought home to the owner of property delivered for transportation, and assented to clearly and unequivocally by him, will be binding and obligatory upon him: *Judson v. Western R. R. Co.*, 83 Id. 646, and note 651.

RESTRICTIONS UPON COMMON-LAW LIABILITY OF COMMON CARRIER, for goods intrusted to him for transportation, are to be construed most strongly against him, especially where they have been inserted in a receipt drawn up by himself for his own benefit, and signed by him alone: *Hooper v. Wells etc.*, 85 Am. Dec. 211, and see cases in note 230.

COMMON CARRIER CANNOT, BY GENERAL NOTICE, RESTRICT his common-law liability: See *West. Transp. Co. v. Newhall*, 76 Am. Dec. 760, and extended note 775; *Steele v. Townsend*, 77 Id. 49, and cases collected in note 57.

THE PRINCIPAL CASE IS CITED to the point that common carriers may limit their liability by notice brought home to the owner of goods before or at the time of their delivery, and expressly or impliedly assented to by him, in *Little v. Boston etc. R. R.*, 66 Me. 241; and is cited and distinguished as to this point in *Grace v. Adams*, 100 Mass. 509. It is cited to the point that a common carrier cannot by contract exempt itself from liability for loss resulting from any negligence on its part, in *Ohio etc. R'y Co. v. Selby*, 47 Ind. 486.

STATE v. COOMBS.

[55 MAINE, 477.]

PERSON IS GUILTY OF LARCENY WHO, WITHOUT ANY PRESENT INTENTION OF THEFT, obtains possession of another's team by falsely and fraudulently pretending that he wanted to drive it to a certain place, to be gone a specified time, when in fact he intended to go to a more distant place, and to be absent a longer time, and who, while thus in possession, without the consent of the owner, converts the team to his own use with a felonious intent.

INDICTMENT for larceny. The head-note and opinion state the case. The jury found a verdict of guilty, and the defendant alleged exceptions.

A. M. Pulsifer, for the defendant.

Frye, attorney-general, for the state.

By Court, DICKERSON, J. Exceptions. The prisoner was indicted for the larceny of a horse, sleigh, and buffalo robes. The jury were instructed that if the prisoner obtained possession of the team by falsely and fraudulently pretending that he wanted it to drive to a certain place, and to be gone a specified time, when in fact he did not intend to go to such place, but to a more distant one, and to be absent a longer time, without intending at the time to steal the property, the team was not lawfully in his possession, and that a subsequent conversion of it to his own use, with a felonious intent while thus using it, would be larceny.

It is well settled that where one comes lawfully into possession of the goods of another, with his consent, a subsequent felonious conversion of them to his own use without the owner's consent does not constitute larceny, because the felonious intent is wanting at the time of the taking.

But how is it when the taking is fraudulent or tortious, and the property is subsequently converted to the use of the taker with a felonious intent? Suppose one takes his neighbor's horse from the stable, without consent, to ride him to a neighboring town, with the intention to return him, but subsequently sells him and converts the money to his own use, without his neighbor's consent,—is he a mere trespasser? or is he guilty of larceny? In other words, must the felonious intent exist at the time of the original taking, when that is fraudulent or tortious, to constitute larceny?

When property is thus obtained, the taking or trespass is continuous. The wrong-doer holds it all the while without right, and against the right and without the consent of the owner. If at this point no other element is added, there is no larceny. But if to such taking there be subsequently super-added a felonious intent,—that is, an intent to deprive the owner of his property permanently without color of right or excuse, and to make it the property of the taker without the owner's consent,—the crime of larceny is complete. “A felonious intent,” observes Baron Parke in *Regina v. Holloway*, 2 Car. & K., 61 Eng. Com. L., 944, “means to deprive the

owner, not temporarily, but permanently, of his own property without color of right or excuse for the act, and to convert it to the taker's use without the consent of the owner."

The case of *Regina v. Steer*, 2 Car. & K., 61 Eng. Com. L., 988, is in harmony with this doctrine. The prosecutor let the prisoner have his horse to sell for him; he did not sell it, but put it at a livery stable. The prosecutor directed the keeper of the stable not to give up the horse to the prisoner, and told the prisoner he must not have the horse again, to which the prisoner replied, "Well." The prisoner got possession of the horse by telling a false story to the servant of the keeper of the stable, and made off with him. The case was reserved, and the court held the prisoner guilty of larceny: *Commonwealth v. White*, 11 Cush. 483.

In the case at bar the prisoner obtained possession of the property by fraud. This negatives the idea of a contract, or that the possession of the prisoner was a lawful one when he sold the horse. He was not the bailee of the owner, but was a wrong-doer from the beginning; and the owner had a right to reclaim his property at any time. It has been decided that when a person hires a horse to go to a certain place, and goes beyond that place, that the subsequent act is tortious, and that trover may be maintained on the ground of a wrongful taking and conversion: *Morton v. Gloster*, 46 Me. 520.

In contemplation of law, the wrongful act was continuous, and when to that act the prisoner subsequently added the felonious intent, that is, the purpose to deprive the owner of his property permanently, without color of right or excuse, and to covert it to his own use without the consent of the owner, the larceny became complete from that moment. The color of consent to the possession obtained by fraud does not change the character of the offense from larceny to trespass or other wrongful act. In such case, it is not necessary that the felonious intent should exist at the time of the original taking to constitute larceny, the wrongful taking being all the while continuous.

It is to be observed that this principle does not apply in cases where the owner parted with his property, and not the possession merely, as in the case of a sale procured by fraud or false pretenses. In such instances, there is no larceny, however gross the fraud by which the property was obtained: *Mowrey v. Walsh*, 8 Cow. 238; *Ross v. People*, 5 Hill, 294. "It is difficult to distinguish such a case from larceny," remarks

Mr. Justice Cowen, in *Ross v. People*, *supra*, "and were the questions *res nova* in this court, I for one would follow the decision in *Rex v. Campbell*, 1 Moody C. C. 179. The decisions, however, are the other way, even in England, with the single exception of that case, and they have long been followed here. There is nothing so palpably absurd in this as to warrant our overruling them."

We are unable to discover any error in the instructions of the presiding judge.

Exceptions overruled. Judgment for the state.

KENT, WALTON, BARROWS, DANFORTH, and TAPLEY, JJ., concurred.

LARCENY DEFINED: *State v. Homes*, 57 Am. Dec. 271, note; *State v. South*, 75 Id. 250; felonious intent necessary: Id.; *Offutt v. Earlywine*, 32 Id. 40; *Smith v. Skulte*, 32 Id. 33; when person is guilty of: *Dignowitty v. State*, 67 Id. 670, and note.

LARCENY BY BAILEES: *Robinson v. State*, 78 Am. Dec. 487, and note 488.

ONE WHO OBTAINS POSSESSION OF PERSONAL PROPERTY BY CONSENT OF OWNER, under pretense of hiring it for a temporary purpose, when in fact he intends thereby to wholly deprive the owner of it, and actually puts it to a different purpose, is guilty of larceny: *State v. Humphrey*, 78 Am. Dec. 605.

THEFT AT COMMON LAW IS COMMITTED BY SERVANT who picks up lost ring in house of her mistress, with intent at the time to convert it to her own use, and who knew that the ring belonged to her mistress: *State v. Cummings*, 89 Am. Dec. 208.

BROWN v. BATES.

[55 MAINE, 520.]

INTEREST OF MORTGAGEE OF LANDS IS NOT LIABLE TO ATTACHMENT OF sale on execution prior to foreclosure.

MORTGAGE TO TWO OR MORE PERSONS TO SECURE DEBTS DUE THEM SEVERALLY CREATES ESTATE IN COMMON, and the mortgagees are tenants in common, and not joint tenants.

ASSIGNEE OF THREE OUT OF FOUR MORTGAGES MAY, UNDER MORTGAGE MADE TO SECURE THEIR SEVERAL DEBTS, maintain a writ of entry for the possession of the mortgaged premises against the mortgagor, and all claiming under him, if the interest of the fourth mortgagee has not been legally assigned to the defendant, but remains vested in some third party, and the plaintiff in such case is entitled to an absolute judgment.

WRIT of entry to recover possession of certain land. Case submitted to the full court upon the evidence. The facts are stated in the opinion.

A. P. Gould, for the plaintiff.

Tallman and Larrabee, for the defendant.

By Court, WALTON, J. Jonathan Bryant mortgaged the demanded premises (with other lands) to William Wilson, Amherst Whitmore, Thomas J. Southard, and James M. Hager. Three of these mortgagees (Wilson, Whitmore, and Southard) have assigned their interests to the plaintiff, and the only ground taken in defense is, that the interest of Hager, the fourth mortgagee, has been assigned to the defendant, and that he is a co-mortgagee with the plaintiff; and the question is then very pertinently asked, if one co-mortgagee can maintain an action for possession against another. We do not find it necessary to answer this question, for the reason that the evidence fails to establish the fact that the defendant is a co-mortgagee with the plaintiff.

The defendant does not appear to have any other title than what he obtained from Foster, and Foster had none except what he derived through the sheriff's deed, and the sheriff's deed conveyed only an equity of redemption. The parties may have supposed that the sheriff's deed conveyed not only the equity, but also the interest of one of the mortgagees (Hager), which had been assigned to the judgment debtor. But this was impossible. The interest of a mortgagee cannot be attached or sold on execution: *Smith v. People's Bank*, 24 Me. 185. And the sheriff's deed does not purport to convey anything but the equity of redemption. How, then, can the proposition be maintained that the defendant is a co-mortgagee with the plaintiff? We think it cannot. It is neither proved nor admitted.

But the question here arises, whether the action can be maintained in the name of the plaintiff alone, if he is the assignee of three only of the mortgagees, and the interest of the fourth is in some third party. We have no doubt it can be. When a mortgage is given to two or more persons to secure debts due to them severally, it creates a tenancy in common, and not a joint tenancy: *Burnett v. Pratt*, 22 Pick. 556. And tenants in common may all, or any two or more, join in the suit to recover the land, or any one may sue alone: R. S., c. 104, sec. 9. The mortgage in this case was given to secure debts due to the mortgagees severally; namely, four hundred dollars to Wilson and Whitmore, five hundred dollars to Southard, and six hundred dollars to Hager. The plaintiff,

being assignee of Wilson, Whitmore, and Southard, is entitled to maintain a writ of entry for the possession against the mortgagor, and all claiming under him, if the interest of Hager, the fourth mortgagee, has not been legally assigned to him, but is to be regarded as still vested in some third party.

The plaintiff, therefore, is entitled to judgment. Shall it be absolute or conditional? We think it must be absolute. The action is not brought to foreclose a mortgage, and no motion appears to have been made in the court below for a conditional judgment; and we have no means of ascertaining the amount due upon the mortgage, — \$1,285.44 appears to have been due in 1855. And as the defendant is said to be in possession of only a small part of the mortgaged premises, and as he will be obliged to pay the whole amount due, with interest, in order to redeem such part (*Rangeley v. Spring*, 21 Me. 130), we presume a conditional judgment would be of no service to either party.

Judgment for plaintiff.

APPLETON, C. J., and CUTTING, DICKERSON, DANFORTH, and
TAPLEY, JJ., concurred.

INTEREST OF MORTGAGEE IN LANDS IS NOT SUBJECT TO ATTACHMENT: *Columbia Bank v. Jacobs*, 81 Am. Dec. 792; or to levy on execution: *McLaughlin v. Shepherd*, 52 Id. 646, and note 649.

MORTGAGEE OF UNDIVIDED PART OF LAND IS CO-TENANT OF ESTATE: *Shepard v. Richards*, 61 Am. Dec. 473.

WRIT OF ASSISTANCE ISSUED IN SUIT TO FORECLOSE MORTGAGE WILL NOT JUSTIFY OFFICER to whose hands it may come in putting out of possession of the premises a person who was neither a party to the suit nor named in the writ: *Brush v. Fowler*, 85 Am. Dec. 382; see *Schenck v. Conover*, 78 Id. 86; *Wilson v. Polk*, 51 Id. 152, note; *Montgomery v. Middlemiss*, 81 Id. 146.

JEWETT v. GAGE.

[55 MAINE, 583.]

OWNER OR CUSTODIAN OF SWINE IS LIABLE FOR INJURY OCCASIONED BY PERMITTING THEM TO RUN AT LARGE in the highway without a keeper, although he did not know they were in the highway at the time of the injury.

CASE. The action was for an injury to the plaintiff's wagon and minor daughter, caused by his horse's fright at the defendant's hog, which was on the highway without a keeper.

The jury were instructed, in substance, that if the hog was owned by the defendant, or was in his custody, and was permitted by him to be at large in the highway without a keeper, and the horse was frightened by the hog, although its looks alone caused the fright and resulting injury, the defendant would be liable, though he did not know the hog was in the highway at the time of the accident. Verdict for the plaintiff, and the defendant alleged exceptions.

A. Libbey, for the defendant.

J. Baker, for the plaintiff.

By Court, CUTTING, J. It appears that on August 29, 1865, the plaintiff's daughter, with a suitable horse and vehicle, and in the exercise of ordinary care, was traveling in and along a public highway in the vicinity of the defendant's house, when an animal, called by various names, such as hog, sow, swine, and by the classical counsel for the plaintiff, *monstrum horrendum*, aged, of large size, filthy, unclean by the Levitical, and prohibited from running at large in the streets by the statute, law, suddenly arose from the gutter, frightened the horse, and caused the damage for the recovery of which this suit is brought.

It is contended by the defendant's counsel that such animals have the right to run in the highway when accompanied by a keeper. It may be so, but such is not this case. There was no keeper, and besides, the hog was not *in transitu*. It is a mistaken idea that animals prohibited by statute from running at large without a keeper, if with a keeper, can be turned into the highway for the purpose of grazing, or swine *recubans* to wallow in the mire by the roadside. The case of *Stackpole v. Healey*, 16 Mass. 31 [8 Am. Dec. 121], is full and conclusive upon this point.

The argument and authorities cited, that the defendant would not be liable, unless the town was liable for suffering a nuisance in the highway, have no application. The one is controlled by the common and the other by statute law.

Exceptions overruled.

APPLETON, C. J., and WALTON, DICKERSON, DANFORTH, and TAPLEY, JJ., concurred.

LIABILITY OF OWNER OF DOMESTIC ANIMAL FOR INJURIES OCCASIONED BY permitting it to be at large in the highway: See *Holden v. Shattuck*, 80 Am.

Dec. 684; *Decker v. Gammon*, 69 Id. 99, and cases collected in note 103; *Kirkwood v. Miller*, 73 Id. 149.

DUTY OF OWNER OF DOMESTIC ANIMALS, AT COMMON LAW, IS TO KEEP THEM ON HIS OWN LAND, and he becomes a wrong-doer if any of them escape upon the lands of another: *Indianapolis etc. R. R. Co. v. McClure*, 89 Am. Dec. 467.

LIABILITY OF OWNER FOR DAMAGES DONE BY HIS DOG: See *Woolf v. Chalker*, 81 Am. Dec. 175, and cases collected in note 183.

THE PRINCIPAL CASE IS CITED as an instance where an individual was held liable for an object in the highway which caused an injury to a traveler by frightening his horse, in *Cord v. Ellsworth*, 65 Me. 532.

CASES
IN THE
COURT OF APPEALS
OF
MARYLAND.

COOKE v. ENGLAND.

[27 MARYLAND, 14.]

DEFECT, IF ANY, OF DECLARING ON SEALED INSTRUMENT BY AVERRING SIMPLY that the defendant "covenanted" with the plaintiff, without saying "under seal," or using any technical word or phrase which in legal acceptation imports a seal, is one of form merely, and is waived by failing to demur, and pleading over; and it is not error to allow the contract to go to the jury.

CONTRACT, THOUGH NOT STAMPED WITH INTERNAL REVENUE STAMP AT TIME OF EXECUTION, is valid and admissible in evidence if the stamp is affixed and canceled, and the penalty paid to the collector of internal revenue, and a note thereof made by him upon the margin of the instrument, before it is offered in evidence.

COVENANT IN LEASE TO KEEP MILL IN NECESSARY REPAIRS does not bind covenantor to add improvements or make additions under his covenant to repair; but he is bound to renew existing machinery when too old and worn to answer its purpose in the mill.

WITNESS WHO TESTIFIES TO IMPAIRED CONDITION OF BOLTING-CLOTHES AT ONE POINT OF TIME during the lease of a grist-mill, on the trial of an action for the breach of a covenant to repair, cannot be asked as to the effect of the impaired condition of the cloths upon the value of the flour manufactured in the mill during the lease, as he can speak only of the value of the flour manufactured at the time he examined the cloths.

DECLARATIONS OF DEFENDANT CONCERNING HIS REFUSAL TO REPAIR or plaintiff's demand to repair is admissible after such demand is proved in an action for a breach of a covenant to repair.

OFFER BY ANOTHER TO RELIEVE PLAINTIFF FROM SIX MONTHS OF LEASE at the same rent, with other favorable terms, is not relevant in mitigation of damages in an action against the lessor for a breach of a covenant to repair.

CARELESSNESS OR UNSKILLFULNESS OF LESSEE OF FLOUR-MILL PRODUCING NECESSITY FOR REPAIRS may go to mitigate damages in an action on the

covenant of the lessor to repair; but this cannot be fairly inferred from the opinion of an expert as to how long the bolting-cloths might last with proper care, and such testimony is properly excluded.

EVIDENCE IN ACTION FOR BREACH OF COVENANT IN LEASE TO REPAIR grist-mill should be admitted on the part of the defendant to show the condition of the elevators in the mill when the plaintiff went into possession, either to show, in connection with other proof, that no repairs were necessary, or to what extent they were required, and to govern in damages.

PRAYER FOR INSTRUCTION NOT BASED ON EVIDENCE IS PROPERLY REJECTED. To RECOVER FOR BREACH OF COVENANT TO REPAIR, demand to repair must be proved.

ALL DAMAGES ARISING UP TO DATE OF VERDICT MAY BE RECOVERED, where the act complained of or the breach assigned is one and complete in itself, and the damages flow naturally and necessarily from it; but the principle would not apply to nuisances and continued trespasses upon land.

ALL DAMAGES ARISING FROM BREACH OF COVENANT IN LEASE TO REPAIR, subsequent as well as prior to the institution of the suit, may be recovered in a suit brought during the term.

MERELY SPECULATIVE INJURIES, DEPENDING ON REMOTE, UNCERTAIN, OR CONTINGENT EVENTS, afford no ground for damages; but certainty, as far as the nature of the case will admit, is to be aimed at.

LEASE, AS TO ITS SUBJECT-MATTER, TERMS, AND PROVISIONS, MUST SPEAK FOR ITSELF; and a usage in the neighborhood is not admissible to vary this rule.

COVENANT. The opinion states the case.

Oliver Miller, for the appellant.

Grayson Eichelberger, for the appellee.

By Court, WEISEL, J. The action in this case was brought in covenant on the 30th of September, 1863, by the appellee, plaintiff below. The declaration averred that the defendant covenanted with the plaintiff to rent to him, the plaintiff, for a certain annual rent, a mill and premises in Carroll County, and that he, the defendant, would, at his expense, keep said mill in the necessary repairs. The breach assigned was that the defendant did not keep the said mill in the necessary repairs, at his, the defendant's, expense, according to said stipulation, and that he did not perform his said covenant.

The defendant pleaded four pleas: 1. That he was not indebted as alleged; 2. That he never promised as alleged; 3. That he was always ready to make repairs to the mill when thereto requested by the plaintiff, and that the plaintiff never notified him that such repairs were needed, and never requested him to make such repairs as alleged in the declara-

tion; and 4. That the plaintiff hindered and prevented the defendant from making repairs on the mill.

Issues were taken on the pleas, and on the trial of them a verdict was rendered for the plaintiff.

In the course of the trial, several exceptions were taken to the admissibility of proof. The first was by the defendant to the admissibility of the lease itself under the pleadings in the cause. The lease was offered by the plaintiff, and was found to be under the seals of the parties; but the court overruled the objection and allowed the paper to be offered in evidence. The point of the exception was, that as the lease was under the seals of the parties, it could not be offered in evidence under a declaration which simply averred that the defendant had covenanted, without adding "under seal"; that the word "covenant" does not *per se* import that the instrument declared on was sealed, that word being frequently used in contracts not under seal; and that the rule of pleading is imperative that where a sealed instrument is the cause of action the declaration must aver it to be under seal, or use some word that legally imports a seal; otherwise, the variance is fatal.

In Maryland, since the adoption of the code, forms of action are again observed, and the declaration must so far correspond with the writ or summons as to show the party entitled to the action brought. Otherwise it would be liable to a demurrer. Under the act of 1856, chapter 112, which abolished forms of action, this court, on more than one occasion, could not disregard the substantial principles which underlie our system of jurisprudence, and to some extent govern the forms of action, though changed or simplified: *Stirling v. Garites*, 18 Md. 475.

The case before us was in covenant. The defendant did not demur, but pleaded to the declaration. The objection arose to the proof as not admissible under the *narr*. The contract offered was a sealed instrument. So far as the form of action was concerned, no objection could be taken to it. The want of a seal would present a more tenable ground of objection. But inasmuch as the declaration avers simply that the defendant covenanted with the plaintiff, without saying under seal, or using some technical word or phrase which in legal acceptance imports a seal, the instrument offered, it is insisted, presents an instance of fatal variance, and should be excluded by the rules of evidence.

If a demurrer had been interposed, the court would be called

upon to say whether under our present simplified mode of pleading the declaration could be maintained. The cases cited by the appellant from New York and Arkansas, and supported by the English authorities, would sustain the demurrer, though the distinction stated by Judge Gould in his treatise on pleading, pages 189, 191, between averments on contracts valid at common law only by deed, and those which by statute are required to be in writing, ought in such a presentation of the question to be properly considered. But we are not called on now to decide, and do not decide, this question. In this case, and under our mode of pleading, we think that the defect, if any, was waived by the pleading over. It is one of form at best. A covenant is by all the authorities a contract under seal: *Miles v. Sheward*, 8 East, 8; Pratt on Covenants, 3; and what fell from Lord Hardwicke and Justice Lee in the case of *Dodd v. Atkinson*, Cas. t. Hardw. 342, is applicable to a case like this. This and other cases furnish to Mr. Platt in his treatise on covenants, page 6, the authority for his text in these words: "So much does the word 'covenant' imply a deed that there is no occasion to allege in a declaration that the deed containing the covenant was under the defendant's seal; the circumstance of sealing must be inferred, and even if it be stated that the defendant covenanted, and the instrument declared on be not sufficiently shown to be a deed, the defect is cured by pleading over."

We therefore think there was no error in the ruling of the court below in allowing the contract to go before the jury on this ground.

The defendant then objected to the admissibility of the paper, because it had not been duly and legally stamped, and the stamp thereon canceled, according to the provisions of the acts of Congress. It was an agreement for a lease, and bore date the twenty-eighth day of February, 1863, with a certificate thereto in these words:—

"\$1.00 stamp. 1865, Nov. 14th, stamped and canceled, and penalty of fifty dollars paid me this day.

"FREDERICK SCHLEY, Collector."

This certificate was dated, and the stamp and penalty paid, on the day of the trial, and before it was offered in evidence. The court overruled the objection and permitted the contract to be read. The defendant excepted.

The various acts of Congress imposing duties for internal revenue, and applicable to this case, have been examined, and

all provide for restoring the validity of the paper by affixing the stamp and canceling the same before offered in evidence. The provisions in the several acts authorizing this to be done in the presence of the court are not exclusive of the provisions elsewhere in said acts for affixing the stamp at any other place or any other prior time, unless in cases arising under the act hereinafter mentioned. The mere authority to stamp in the presence of the court under the former acts we do not construe as the only mode of restoring validity to the instrument. In this case, the act of Congress of 1865, chapter 78, was passed on the 3d of March, 1865, pending and before the trial, and by section 1 (13 U. S. Stats. at Large, 481, 482) the very mode adopted in this case of paying the stamp and penalty to the collector, and having it affixed and so noted by him on the margin of the instrument, was legalized as the proper mode in all cases of previous omission, the said section declaring that "such instrument shall thereupon be deemed and held to be as valid to all intents and purposes as if stamped when made or issued." And if the paper should not fall under the curing provision of this act, it does under the others, and having been stamped before trial, was admissible.

We therefore determine that the contract offered in evidence could not be excluded on this ground, and that the court below did not err in admitting it, and that it was also right in rejecting the fifth, sixth, and seventh prayers of the defendant in his sixteenth exception, which were predicated on this objection.

This being an action for damages for a breach of a covenant for necessary repairs, we are to be governed by the law as to what constitutes such repairs, as it was recognized and announced by this court in the case of *Middlekauff v. Smith*, 1 Md. 340; and passing by for the present the plaintiff's first exception, we will proceed to examine and dispose of in their order the other exceptions of the defendant, bearing in mind the nature of the third and fourth plea, to which issues were taken; viz., that the defendant was not notified of repairs, and that he was hindered and prevented by the plaintiff from making them.

The plaintiff, proceeding in the trial, proved by several witnesses the condition of the bolting-cloth in September, 1863, also of the water-wheel and elevators, and then proposed to prove by Joseph Lowe, a miller, "that in the condition of the bolting-cloth as it was when he examined it (September, 1863),

a new bolting-cloth was a necessary repair." The defendant objected, but the objection was overruled and the proof allowed. This constitutes his third exception. The order of proof is not to be observed. On the hypothesis that the defendant was notified or not prevented, the proof was admissible as showing a state for repairs after the beginning of the lease and during its continuance. If the bolting-cloth was so defective and worn as not to admit of being mended by the miller as tenant, a new one became a necessary repair. The covenantor was not bound to add improvements or make additions under his covenant to repair, but he was bound to renew existing machinery when too old and worn to answer its purpose in the mill. If, for instance, a strap gave way, and the material was too rotten and decayed to be mended, a new one to take its place became necessary as a repair. To show that a new cloth was necessary, the judgment of the witness as a miller was admissible. This would be proper proof, in connection with other facts, under the issues. The court committed no error in permitting it to go in.

The fourth exception arose to the admission of proof, and to the question which elicited it, by the same witness, as to the effect, in his judgment as an experienced miller, upon the quality and value per barrel of the flour manufactured in the mill during the lease whilst the bolting-cloths were in the impaired and worn-out condition as described by him, and because of the want of necessary repairs to them. The witness examined the cloths at one point of time during the lease, and could only speak of the difference in value between flour manufactured then through them and flour run through cloths in the condition in which they should be, leaving it to the jury to apply his answer, upon the question of damages, to the state of facts arising in the case, and to be proved by other witnesses. The question as propounded took too broad a scope, extending over the entire lease, and in this respect it was erroneous, and was properly objected to.

Solomon Gartrell, a witness for the plaintiff, met with the defendant, Cooke, at his store in September, 1863, when Foutz and Groff had been examining the mill. Cooke asked him what they were doing at the mill. He told him they were examining it. The plaintiff's counsel then asked him, "What did Cooke say in that conversation about the mill?" The defendant objected to it, and the proof as inadmissible to prove a demand by the plaintiff on the defendant to repair the mill.

and his refusal, unless the plaintiff should show that he authorized the witness to hold the conversation or to demand of him the making of repairs to the mill. The court overruled the objection. Without proof of authority, the evidence sought would be no proof of demand to repair, and if offered for that purpose, would be inadmissible. But as there was evidence of some notice having been read to Cooke, in the latter part of July, 1863, the plaintiff was entitled to the benefit of any declaration by Cooke touching it or his refusal to repair; and whether the witness was authorized or not to hold the conversation, the declarations of Cooke to him about the mill, if relating to its repairs or his refusal to repair, could not properly have been excluded when asked for by the plaintiff. The court in admitting the proof did not err. This was the fifth exception.

We think the court was also right in refusing the question and proof under the sixth exception. The competency of James England as a miller, and at the beginning of the lease, could not enlighten the jury on the question of damages or the issues in the case.

The testimony ruled out under the seventh exception was offered in mitigation of damages. We do not see how an offer by another to relieve the plaintiff from six months of the lease at the same rent, with other favorable terms, could legitimately bear upon the question of damages. His contract was with the defendant, and that could not be affected by propositions from other quarters, to be accepted or not, from considerations that might have no relation to the controversy. We think the ruling of the court in this exception was correct.

The eighth exception was abandoned in the argument.

We think the court erred in refusing the testimony of Alonso W. Cooke, in the ninth exception, as that testimony appears to us to relate to the same time and occasion, and was properly rebutting. It was for the jury, at all events, to determine from a comparison of the time and other circumstances whether the notice spoken of by the different witnesses was the same and the occasion the same.

The tenth exception. Jacob Zumbrum, who had been the preceding tenant of the mill, and a miller, was asked, "How long would the bolting-cloths in use in said mill, when he left it and when the plaintiff took possession, have lasted and manufactured good flour, with proper care and attention on the part of the miller carrying on the mill?" The question

and the evidence offered were ruled out. If the necessity of repairs were produced by the carelessness or unskillfulness of the miller, that circumstance would go to mitigate the damages. No evidence of unskillfulness had yet been offered, nor could such be fairly inferred from an opinion of an expert, how long the bolting-cloths might last with proper care. The question seems to have had a double aspect: that no repairs were needed, or if needed, it was the fault of the miller; and this prospectively and by inference, from the opinion of a miller, who judged from the appearance of the cloths at the beginning of the lease. We think the proof was properly excluded.

The testimony offered under the fourteenth exception is of the same character and liable to the same objection, and we think was properly ruled out.

By the proof in the eleventh exception the defendant sought to show the condition of the wheat and flour elevators in the mill on or about the 1st of April, 1863, when the plaintiff went into possession. This we think it was competent for him to do. If the defendant were notified to repair, and these were subjects for repair, it was competent to show their condition at the commencement of the lease, in order to compare it with what may have been proved afterwards, either to show no repairs were necessary, or to what extent, and to govern in the damages. We think the court erred in excluding this proof.

We concur with the court in its rulings on the twelfth and thirteenth exceptions. They looked to a condition of things anterior to the lease, which had no bearing upon the issues.

We also think that the evidence offered in the fifteenth exception was inadmissible, and for a like reason.

The sixteenth exception of the defendant is to the rejection of all the prayers offered by him, seventeen in number.

The fifth, sixth, and seventh have been disposed of already in considering the second exception.

We consider that the second, tenth, eleventh, and seventeenth prayers embrace true legal propositions in the case, and ought to have been granted.

The twelfth was properly rejected, because, as we conceive, there was no evidence in the cause of carelessness, negligence, unskillfulness, or other like default of the plaintiff, and the prayer is based on such a state of facts. Had there been proof of such in the case, the prayer would be maintainable.

The third, fourth, ninth, fifteenth, and sixteenth prayers were properly rejected.

The first, eighth, thirteenth, and fourteenth prayers present the questions of the necessity of demand for and a specification of repairs, and also of the proper measure of damages in a case like this. We have already passed upon the requisite of a previous demand in disposing of the second prayer. It is one of the issues in the cause; and we add here, that we concur in this branch of the prayers. What is the proper measure of damages, or whether the jury, in assessing them, can embrace damages subsequent to the institution of the suit and to the date of the verdict, is a question that has produced much difficulty. The decisions upon it are collated and reviewed by Mr. Mayne, in his work on the law of damages, more fully than elsewhere, and he states the result to be "that damages arising subsequent to action brought, or even to the date of the verdict, may be taken into consideration, where they are the natural and necessary result of the act complained of, and where they do not themselves constitute a new cause of action"; and "that general evidence of matter accruing subsequent to the action may be used for the purpose of showing what was the natural and probable result of the defendant's conduct; but that particular facts are not admissible, as a specific ground of damage, to be atoned for on their own account": Mayne on Damages, 33, 35.

Where the act complained of, or the breach assigned, is one and complete in itself, and the damages flow naturally and necessarily from it, the jury can include all to the date of the verdict. This principle would not apply to nuisances and continued trespasses upon land. The rule of damages is at all times difficult, and every case may present features which would vary the best defined rule upon the subject. In the case now before us there was a lease for one year, the lessor covenanting to repair; suit was instituted against him during the lease, and the trial took place after the term had expired. The breach assigned was a refusal to repair. All the consequences of this refusal could be considered by the jury, those subsequent as well as those prior to the institution of the suit, thus terminating the controversy arising from the breach of the covenant assigned in the declaration: See 2 Greenl. Ev., sec. 268 a; *Shortridge v. Lamplugh*, 2 Ld. Raym. 802, 803; *Hodgson v. Stallbrass*, 9 Car. & P. 63; *Ingram v. Lawson*, 9 Car. & P. 326. And as to what would be legitimate damages flowing from the

act complained of, and the mode of assessing them, this court has heretofore expressed its conclusions: *Middlekauf v. Smith*, 1 Md. 341, etc. Certainty, as far as the nature of the case will admit of, is to be aimed at and ascertained. Therefore, merely speculative injuries depending on remote, uncertain, or contingent events, afford no ground for damages.

With these views, the first, eighth, thirteenth, and fourteenth prayers of the defendant did not present the proper rule for damages in this case, and were properly rejected. And whilst in this respect the prayer of the plaintiff was correct, it was faulty in the requisite of a demand and designation of repairs. This was one of the issues in the cause, which the jury was sworn to try, and the prayer or instruction could not ignore it.

The plaintiff's first exception in reference to the saw-mill invokes a usage in the neighborhood in the construction of the lease. This was inadmissible. The lease, as to its subject-matter and terms and provisions, must speak for itself. We affirm the ruling of the court on this exception.

The result is, that the court below erred in its rulings on the fourth, ninth, and eleventh exceptions, and in rejecting the second, tenth, eleventh, and seventeenth prayers in the sixteenth exception of the defendant. It also erred in granting the plaintiff's prayer in the defendant's seventeenth exception. The judgment must therefore be reversed, and a *procedendo* awarded.

Judgment reversed, and *procedendo* awarded.

WHEN RECOVERY CAN BE HAD FOR DAMAGES ARISING OR MONEYS BECOMING DUE AFTER COMMENCEMENT OF ACTION. — The rule originally obtaining at the common law was that in personal actions damages could be recovered only up to the time of the commencement of the action: 3 Com. Dig., tit. Damages, D. And this arbitrary rule was so long adhered to, that up to the time of Lord Mansfield, even in actions of *assumpsit*, the practice seems to have been to compute the interest only to the time of the institution of the suit: 1 Sedgwick on Damages, 106. That illustrious jurist, however, enunciated the true doctrine, and declared that "it is agreeable to the principle of the common law that whenever a duty has been incurred pending the writ, for which no satisfaction can be had by a new suit, such duty shall be included in the judgment to be given in the action already depending"; but "in trespass and in tort new actions may be brought as often as new injuries and wrongs are repeated, and therefore damages shall be assessed only up to the time of the wrong complained of": *Robinson v. Bland*, 2 Burr. 1077, 1086. It is a fundamental principle of the common law that there is no wrong without a remedy, and therefore we have the criterion that if no other action can be maintained for injuries suffered after the commencement of the suit a full recovery will be awarded therein; and in such an action, injuries sustained at any time prior to the verdict may be proved, and compensation

therefor given; and furthermore, it is upon this principle that prospective or future damages are allowed, as where one is permanently injured in a railroad accident. If a new action will lie therefor, no recovery can be had for damages arising after the commencement of the suit: Com. Dig. 363, tit. Damages, D; but if one action only is maintainable, and will operate as a bar to any future suit, full relief will be awarded: *Miller v. Wilson*, 24 Pa. St. 114; *Filer v. N. Y. Cent. R. R. Co.*, 49 N. Y. 42; *Wilcox v. Plummer*, 4 Pet. 172, 182; *Howell v. Goodrich*, 69 Ill. 556; *Stafford v. Oskaloosa*, 64 Iowa, 251; *Hopkins v. Atlantic etc. R. R.*, 36 N. H. 9; *Knapp v. Sioux City etc. R'y Co.*, 32 N. W. Rep. 18 (Iowa); *Klein v. Jewett*, 26 N. J. Eq. 474; *McLaughlin v. City of Corry*, 77 Pa. St. 109; *Thompson v. Ellsworth*, 39 Mich. 719; *Fetter v. Beale*, 1 Ld. Raym. 339, 692. But no damages which accrue after the commencement of the suit can be recovered, except such as are the immediate consequence of the act complained of: *Johnson v. Perry*, 2 Humph. 569, 572. They must be the natural and necessary result of that act, and flow as a direct and natural consequence therefrom: Wood's *Mayne on Damages*, sec. 103; *Wilcox v. Plummer*, 4 Pet. 172, 182; *Fort v. Union Pacific R. R. Co.*, 2 Dill. 259; *Hicks v. Herring*, 17 Cal. 566; *Birchard v. Booth*, 4 Wis. 67. Thus in an action for an injury to a slave, proof of medical bills contracted and paid after the issuance of the writ was held not to be competent, as this damage was collateral; but proof of the death of the slave, after suit brought as a direct consequence of the injury, might be received, and also other evidence showing that the injury proved to be greater by lapse of time: *Johnson v. Perry*, 2 Humph. 569, 572. In *Hopkins v. Atlantic etc. R. R.*, 36 N. H. 9, in an action by a husband against a railroad company for an injury to his wife, he was allowed to recover his expenses for her cure incurred after the bringing of the suit. And in *Dixon v. Bell*, 1 Stark. 287, an action for wounding the plaintiff's son *per quod servitium amisit*, the amount of the surgeon's bill was allowed, though it had not been paid; but not the physician's fees, on the ground that they could not be enforced by action.

But in actions for trespasses or nuisances, recovery can be had, ordinarily, only up to the commencement of the suit (see *infra*); for every continuance or repetition of the nuisance or trespass gives rise to a new cause of action, and the plaintiff may continue to bring successive actions as long as the nuisance lasts or the trespasses are repeated; and if this be inconvenient, then in many cases he may have an injunction. The distinction, however, between cases where successive actions lie and those in which but one action may be maintained, and in which, consequently, complete relief is awarded, is well illustrated by the case of *Blunt v. McCormick*, 3 Denio, 232, in which it was said that in action for obstructing lights, damages are recoverable only up to the commencement of the suit, but had the action been upon a covenant not to obstruct the light, the rule would be otherwise; for the covenant being a single cause of action, one recovery on it would be an absolute bar to any further action. So in an action for breach of promise of marriage, it was erroneous to refuse the instruction that if the jury should find against the defendant, they could not take into account any damages sustained by the plaintiff from reports raised since the commencement of the suit, for any recovery for slander must be had in a separate suit, and may not properly be obtained in a suit for a breach of contract of marriage: *Greenup v. Stoker*, 2 Gill, 688.

Injuries to Person. — Only one action can be brought for an injury to the person of the plaintiff which is the result of a single wrongful act, and therefore in that action all damages, present and future, must be recovered: *Filer*

v. *New York Cent. R. R. Co.*, 49 N. Y. 42. Such is the case in an action for an assault and battery: *Fetter v. Beale*, 1 Ld. Raym. 339, 692; and damages accruing after the commencement of the suit may be recovered if they are the direct and natural consequence of the battery: *Birchard v. Booth*, 4 Wis. 67. This is the rule in actions against railroad companies for negligence causing injury to a person: *Stafford v. Oskaloosa*, 64 Iowa, 251; *Aaron v. Second Ave. R. R. Co.*, 2 Daly, 127; *Klein v. Jewett*, 26 N. J. Eq. 474; *Knapp v. Sioux City etc. R'y Co.*, 32 N. W. Rep. 18 (Iowa); *Ohio etc. R'y Co. v. Cosby*, 7 N. E. Rep. 373 (Ind.); and the same rule applies in actions against municipal corporations: *McLaughlin v. City of Corry*, 77 Pa. St. 109; *Squires v. Chilli-cothe*, 1 S. W. Rep. 23 (Mo.); by a servant against a master for the negligence of another employee: *Fert v. Union Pacific R. R. Co.*, 2 Dill. 259; and for malpractice: *Howell v. Goodrich*, 69 Ill. 556, — where the cause of action is negligence, causing injury. And upon this principle, in an action by a husband against a railway company for an injury to his wife, his expenses for her cure incurred after the bringing of the suit were allowed: *Hopkins v. Atlantic etc. R. R.*, 36 N. H. 9.

Other Personal Actions. — So in a action of *assumpsit* against an attorney for negligence and unskillfulness, proof of actual damages may extend to facts that occur and grow out of the injury, even up to the day of the verdict: *Wilcox v. Plummer*, 4 Pet. 172, 182. So in an action of false imprisonment, damages were given for a continuance of the imprisonment after the commencement of the action: *Brasfield v. Lee*, 1 Ld. Raym. 329; *Hanbury v. Ireland*, Cro. Jac. 379; and the plaintiff may recover for loss of work, not only up to the time of the suit, but also for the time lost after the suit, if by the arrest he failed to get the work he otherwise would have obtained: *Thompson v. Ellsworth*, 39 Mich. 719.

In an action for enticing away an apprentice, however, where there has not been an entire loss of the apprentice, as by removing him to a distant country, it is erroneous for a jury to give damages for the loss of services for a period elapsing after the commencement of the suit: *Moore v. Love*, 3 Jones, 216; *Trigg v. Northcut*, Lit. Sel. Cas. 414. But if a permanent injury has been inflicted upon an apprentice, damages up to the end of the term of service may be recovered, though the action is brought during the term: *Hodson v. Stallbrass*, 9 Car. & P. 63. Where, however, the action is brought before expiration of the term of service to recover damages for a wrongful discharge, and the trial is had after the expiration of the term, damages may be awarded as though the suit had been brought after the expiration of the term: *Benson v. Powers*, 89 N. Y. 527; S. C., 42 Am. Rep. 319.

CONTRACTS, BONDS, AND COVENANTS are governed by the same legal principle of total recovery where there is but one action. And in an action upon such instruments, if the original breach "is such that the plaintiff at all events would be entitled to nominal damages, then he can go on to give in evidence those consequences of the act which are immediately traceable to it, although they have taken place after the commencement of the suit": 1 Sedgwick on Damages, 107. Thus in an action upon a bond for a breach thereof, the damage occurring during the pendency of the suit may be included in the judgment: *Gennings v. Norton*, 35 Me. 308. Therefore, in a suit upon a bond binding the obligor not to exercise a trade within certain limits of time and place, damages may be recovered for the breach that are sustained after the date of the writ, and up to the time of the trial: *Whitney v. Stalton*, 40 Id. 224; but see *Just v. Greve*, 13 Ill. App. 302. And in actions upon bonds of indemnity, the damages are assessed up to the time of

the trial, because there cannot be successive actions: *Spear v. Stacy*, 26 Vt. 61. And likewise in an action for a breach of an agreement to withdraw another suit, the costs of the plaintiff in that action, who is the defendant in the present action, may be recovered by the plaintiff in this action, if paid by him at any time before verdict: *Hagan v. Riley*, 13 Gray, 515.

In actions for the breach of covenants to repair, damages may be given up to the trial, and for subsequent damages a new action may be sustained: *Phelps v. New Haven etc. Co.*, 43 Conn. 453; the principal case. Upon the breach of a covenant not to obstruct lights, a complete recovery may be had: *Blunt v. McCormick*, 3 Denio, 283. And in suits on covenants of warranty, and against encumbrances, the plaintiff may recover the amount fairly and justly advanced to remove the encumbrances, though paid after the institution of the suit: *Leffingwell v. Elliott*, 10 Pick. 204; *Brooks v. Moody*, 20 Id. 474; *Spear v. Stacy*, 26 Vt. 61. But upon the breach of a contract to furnish a home and support to a person, the damages are to be assessed to the date of the writ only: *Fay v. Guymon*, 131 Mass. 31.

INTEREST is an accessory of the principal, and does not stop running at the commencement of the action, but may always be computed to the time of the verdict: *Robinson v. Bland*, 2 Burr. 1077; *Hovey v. Newton*, 11 Pick. 420; *Duncan v. Markley*, Harp. 179; *Puckett v. Smith*, 5 Strob. 26; S. C., 53 Am. Dec. 687; 2 Greenl. Ev., sec. 268 a. And if a demand is necessary, and none is made, interest will run from the service of the writ: *Haven v. Foster*, 9 Pick. 112; S. C., 19 Am. Dec. 353. So interest will run from the commencement of suit upon the value of timber cut: *Warner v. Putnam*, 63 Wis. 410. On bills of exchange and other debts which carry interest, interest is computed up to judgment: Wood's *Mayne on Damages*, sec. 106; 2 Wms. Saund. 171 d, note 9; 2 Wms. Notes to Saund. 499; Com. Dig. 363, tit. Damages, D; *Brewster v. Wakefield*, 1 Minn. 352; S. C., 69 Am. Dec. 343.

TRESPASS—NUISANCE. — In the case of repeated trespasses, successive actions lie, and therefore the reason of the rule permitting a recovery up to the time of the trial fails, as each repetition of the trespass constitutes a new cause of action: *Plate v. New York Cent. R. R. Co.*, 37 N. Y. 472. And therefore in an action of trespass, *McConnel v. Kibbe*, 33 Ill. 175, S. C., 85 Am. Dec. 265, such as for the interruption of an easement of way: *Freeman v. Sayre*, 2 Atlantic Rep. 650, only such damages may be recovered as arise prior to the commencement of the suit. Still, in an action of trespass for injuring plaintiff's leasehold interest in a store rented from the defendant by the destruction of his adjoining store, it was held that as the injury was one which from its nature would necessarily continue independent of any subsequent wrongful act on the part of the defendant, the plaintiff might prove and recover damages arising after the commencement of the suit and up to the end of the tenancy: *Conlon v. McGraw*, 33 N. W. Rep. 388 (Mich.). See also *Puckett v. Smith*, 5 Strob. 26; S. C., 53 Am. Dec. 686. Damages from a continuing cause, such as a nuisance for which successive actions lie, are generally recoverable only down to the time of commencing the action: 1 Sutherland on Damages, 198, 202; *Blunt v. McCormick*, 3 Denio, 283; *Phillips v. Terry*, 3 Keyes, 313; *Whitmore v. Bischoff*, 5 Hun, 176; *Uline v. New York Cent. R. R. Co.*, 4 N. E. Rep. 541-552 (containing an able and lengthy discussion of this subject, and citing, among other cases, *Mahon v. New York Cent. R. R. Co.*, 24 N. Y. 658; *Green v. New York Cent. etc. R. R. Co.*, 65 How. Fr. 154; *Taylor v. Metropolitan Elevated R'y Co.*, 50 N. Y. Super. Ct. 312; *Duryea v. Mayor etc.*, 33 Id. 120; S. C., 26 Hun, 120); *Duncan v. Markley*, 1 Harp. 276; *Brown v. Chicago etc. R. R. Co.*, 80 Mo. 457; *Shaw v. Etheridge*,

3 Jones, 300; *Moore v. Love*, 3 Id. 215; *Stadler v. Grieben*, 61 Wis. 500; and the damages are recoverable only up to the issuance of the writ, and not to the filing of the declaration: *Langford v. Orsley*, 2 Bibb, 215; S. C., 4 Am. Dec. 699. In *Fifth Nat. Bank v. New York Elevated R. R. Co.*, 28 Fed. Rep. 231, however, damages to the time of the trial were allowed in an action to recover damages for the erection of the defendant's railroad track and station-house in front of the plaintiff's banking-house, on the ground that the damages grew directly out of the maintenance of the structure, and that the defendant was not misled. See, however, *Uline v. New York Cent. etc. R. R. Co.*, 4 N. E. Rep. 536; and in case for a nuisance, if the act done is necessarily injurious, and is of a permanent nature, the party injured may at once recover his damages for the whole injury, though if the act done is not necessarily injurious, or if it is contingent whether further injury may arise, the plaintiff can recover damages only to the date of his writ: *Troy v. Cheshire R. R. Co.*, 23 N. H. 83, 102; *Uline v. New York Cent. etc. R. R. Co.*, 4 N. E. Rep. 550; *Conlon v. McGraw*, 33 N. W. Rep. 388 (Mich.). But the court will not proceed upon a presumption that the nuisance will be permanent, and this must plainly appear: *Uline v. New York Cent. etc. R. R. Co.*, *supra*; *Sibley Mfg. Co. v. State*, 11 N. E. Rep. 264 (N. Y.).

Though ordinarily, in an action for a nuisance, damages which arise after the commencement of the suit cannot be recovered, yet there are cases where evidence of such damages is admissible. Thus in an action to recover damages for overflowing lands, evidence of injuries occurring after the institution of the suit was admitted, with a view to affording information to the jury of the consequences of the diversion under similar circumstances before suit brought: *Polly v. McCall*, 1 Ala. Sel. Cas. 246. And in an action for the abatement of a dam, the plaintiff may prove damages suffered after the commencement of the suit, for the purpose of showing that the nuisance complained of still continued to exist, to plaintiff's prejudice: *Hayden v. Albee*, 20 Minn. 159. So an injury arising from the death of growing timber, if such death is caused by an overflow of land prior to the commencement of an action for damages, may properly be included in the damages recovered, though the timber does not in fact die till after the commencement of the action: *Id.*; see *Phillips v. Terry*, 3 Keyes, 313.

ACTIONS IN RELATION TO REALTY.—In real actions, it is said damages may be recovered up to the time of the verdict: *Com. Dig.* 363, tit. Damages, D. So where a tenancy at will is wrongfully terminated by the landlord, the tenant's damages are not restricted to the beginning of the suit, but he may recover such damages as are the direct result of his expulsion up to the time when the tenancy might be lawfully determined: *Palmer v. Crosby*, 1 Blackf. 139; *Ashley v. Warner*, 11 Gray, 43. And a tenant in common of a ferry in an action of account or on the case against his co-tenant may recover his share of the income of the ferry, and all damages may be assessed which have arisen *pendente lite*: *Puckett v. Smith*, 5 Strob. 26; S. C., 53 Am. Dec. 686. And in an action of forcible entry and detainer, rents and profits may be recovered up to the time of the verdict, for the loss of them is a necessary consequence of the deprivation of possession, and of necessity continues until restitution: *Hicks v. Herring*, 17 Cal. 569, *per* Field, C. J. And it is also intimated in this case, though no opinion is expressed upon the point, that in an action of forcible entry and detainer, the plaintiff might insert a conditional prayer in his complaint, that if waste were subsequently committed, investigation be had in relation thereto, and the damages occasioned thereby be allowed, and he might then possibly be entitled, under the stat-

ute, to make his proof and call for an assessment from the jury. But if no such prayer were inserted, and no such recovery were had, the forcible entry and detainer suit would be no bar to a subsequent suit to recover for waste committed on the premises during the period between the commencement of the former suit and judgment therein. In Indiana, in an action of disseisin under the code of procedure of that state, damages may be recovered up to the trial: *Pendergast v. McCaslin*, 2 Ind. 87. But in *Larrabee v. Lambert*, 36 Me. 440, it is held that rents and profits are recoverable only up to the date of the writ.

THE PRINCIPAL CASE IS CITED to the point that in an action for a breach of covenant the jury may give such damages as they may find to be the natural and necessary result of the acts of the defendant which they find justly complained of by the plaintiff in his narr.: *Jacobs v. Davis*, 34 Md. 214; that mere conjectural or speculative damages depending upon future contingency cannot be recovered: *Shafer v. Wilson*, 44 Id. 280; and that the defect of a want of a stamp on a deed is supplied by the affixing of a stamp and the payment to the collector of the penalty prescribed by the act of Congress, as this is a substantial compliance with the stamp law: *Carson v. Phelps*, 40 Id. 96.

SHILLING AND WIFE v. CARSON.

[27 MARYLAND, 175.]

AS PLAINTIFF IS PERMITTED TO PROVE MALICIOUS INTENT, IN ACTIONS OF SLANDER, in order to aggravate the damages, so the defendant, to repel it, may show grounds of suspicion of the truth of the charge, by facts and circumstances; not in bar of the action, but in mitigation of damages.

PARTICULAR INSTANCES OF MISCONDUCT ARE NOT ADMISSIBLE TO DIMINISH DAMAGES in an action of slander, where general character is the subject of defamation, for the plaintiff is required to be prepared to maintain only his general reputation.

GENERAL REPUTATION FOR WANT OF CHASTITY IS ADMISSIBLE IN MITIGATION OF DAMAGES in an action of slander, the subject-matter of which is the reputation of a woman for chastity; for she must be expected to be ready to vindicate her character in that particular in which it is impugned.

ADMISSION OF EVIDENCE IN MITIGATION OF DAMAGES IN ACTION OF SLANDER, being either to show absence of malice or want of reputation, whatever circumstance tends to prove the one or the other, is within the reason of the rule.

PLAINTIFF'S MOTHER MAY BE ASKED, ON CROSS-EXAMINATION in action of slander for impugning plaintiff's chastity, whether or not before the defamation complained of the witness had spoken to others and complained to them, and had frequent misunderstandings with them on the same subject, as this is evidence, not of mere rumor or report, but of facts which go to show that the words were spoken under an impression of their truth, and not with any malicious intention, and the evidence is admissible under the general issue.

NO INDUCTEMENT SETTING FORTH PREVIOUS REPUTATION OF PLAINTIFF is necessary in an action of slander under the code. Every woman is presumed to be chaste and every man to be honest until the contrary is

shown, and this being necessarily implied, the rules of evidence in mitigation of damages must be the same as if such inducement were averred. TESTIMONY COLLATERAL TO ISSUE IS PROPERLY EXCLUDED.

CASE by Alice C. B. Carson, by her next friend, G. P. Cook, against Henry Shilling and Harriet Shilling, his wife, for slanderous words alleged to have been uttered by the defendant Harriet. Verdict for the plaintiff for one thousand dollars, and defendants appealed. The opinion states the case.

William T. Hamilton and Andrew K. Syester, for the appellants.

R. H. Alvey, for the appellee.

By Court, BOWIE, C. J. The action in which this appeal is taken is a suit for defamation of character, brought by the appellee against the appellants, for malicious words spoken by Harriet, the wife. The words charged are made actionable by the Code of Public General Laws, art. 89, secs. 1, 2.

Issue was joined on the general plea that the defendant Harriet did not commit the wrongs as alleged in the declaration, which is equivalent to *non cul.* under the old forms.

At the trial, the plaintiff having given evidence to support the issue on her part by examining her mother, the defendants, on cross-examination, proposed to prove by the same witness that she had heard "rumors and reports touching the character of the plaintiff for chastity before the interview in which the defendant used the defamatory words charged, and had spoken to others, and complained to them, and had frequent misunderstandings with them on the same subject," to which the plaintiff objected, and the court sustained the objection, which forms the ground of the first bill of exceptions on the part of the defendants.

The defendants, then, further to support the issue on their part, after proving that the witness was present at the conversation testified to by plaintiff's witnesses, in which the latter charged the daughter of the defendant with using defamatory words, and said to her, "Harriet Shilling, I want you to stop your daughter from calling my daughter a —," proposed to call the daughter to prove she at no time and to no person used such language; which being objected to by the plaintiff, and sustained by the court, constitutes the second exception.

The record does not show for what purpose the testimony offered and excluded in the first exception of the defendant was proposed to be given, but it must be inferred from the

pleadings that it was offered in mitigation of damages, as it is very well understood, according to the practice in this state, it could not have been admitted for any other purpose.

It is insisted, on the part of the appellants, that the testimony offered should have been admitted to reduce the damages, whether they are regarded as punitive or compensatory: if the former, as showing the words spoken were not uttered maliciously, but as a common rumor; if the latter, because they showed the general reputation of the plaintiff for chastity was before then impeached. The appellee contends that the testimony offered was properly rejected, as it virtually tended to extenuate the wrong of the defendant by proof of its repetition, since the rumors might have originated with the defendant.

In the case of *Wagner v. Holbrunner*, 7 Gill, 300, this court announces the principle which governs the admission of evidence in mitigation of damages, in actions of slander, as follows: "As in all actions of slander, the plaintiff is permitted to prove the malicious intent in order to aggravate the damages, so the defendant, to repel it, may show grounds of suspicion of the truth of the charge, by facts and circumstances; not in bar of the action, but in mitigation of damages."

The defamation complained of in this case appears to have occurred at an interview between the plaintiff's mother and defendant's wife, in which the latter used the words complained of in reply to the threat of the former to sue the defendant's daughter.

It does not appear that the defendant Harriet had ever before used any defamatory words of the plaintiff. It would be a violent presumption to suppose she was the author of all the former reports which the witness had heard, in the absence of such proof.

Where general character is the subject of defamation, the defendant would not be permitted to diminish the damages by evidence of particular instances of misconduct, because the plaintiff is required to be prepared only to maintain his general reputation; but if the subject-matter of the suit be the reputation of a woman for chastity, she must be expected to be ready to vindicate her character in that particular in which it is impugned. General reputation for a want of chastity would certainly be admissible in mitigation of damages.

The admission of evidence in mitigation of damages being either to show the absence of malice or the want of reputation,

whatever circumstance tends to prove the one or the other is within the reason of the rule. As we have shown, this court has decided that facts and circumstances may be given in evidence, under the general issue, not amounting to proof of justification, but has not defined what constitutes such facts and circumstances.

Professor Greenleaf, in his second volume on evidence, section 275, says: "But whether the defendant will be permitted, under the general issue, to prove general suspicions and common reports of the guilt of the plaintiff in mitigation of damages, is not universally agreed. It seems, however, that where the evidence goes to prove the defendant did not act wantonly and under the influence of actual malice, or is offered solely to show the real character and degree of the malice which the law implies from the falsity of the charge, all intention of proving the truth being expressly disclaimed, it may be admitted and of course be considered by the jury."

In the case of *Wolcott v. Hall*, 6 Mass. 514, 518 [4 Am. Dec. 173], in which Chief Justice Parsons so eloquently denounced the attempt of the defendant to introduce reports of the guilt of the plaintiff, the defendant justified, and then sought, in mitigation of damages (failing in proof of his plea), to show the plaintiff had been charged with theft in particular instances. There, it was very properly said, evidence of the plaintiff's general character was not offered, but only an attempt to blast his reputation by particular reports; such an attempt, under the circumstances, was evidence of continuing malice. Where, however, the defendant denies using the defamatory words, she admits their falsehood, and the effort to show the circumstances under which they were used implies no persistence in the charge, but recantation and apology. The evidence proposed to be offered by the defendant on cross-examination of the plaintiff's witness was not mere rumor or report, but the fact, that, before the defamation complained of, the witness, the plaintiff's "mother, had spoken to others and complained to them, and had frequent misunderstandings with them on the same subject." These are circumstances to show the words were spoken under an impression of their truth, and not with any malicious intention. This testimony is closely analogous to that which was admitted or ruled to be good by Lord Ellenborough, in the case of — *v. Moor*, 1 Maule & S. 284. In that case the witness who proved the slanderous words, imputing unnatural practices to the defend-

ant, was asked upon cross-examination whether he had not heard reports in the neighborhood that the plaintiff had been guilty of similar practices. Lord Ellenborough held the evidence admissible in mitigation of damages, upon the ground that a person of disparaged fame is not entitled to the same measure of damages as one of unblemished character.

The case of *Leicester v. Walter*, 2 Camp. 251, it is said, turned somewhat on the inducement of the *narr.*, which set forth that the plaintiff had always preserved a good character in society, and this was referred to by Sir James Mansfield as a reason for admitting evidence of reports; but in summing up he said: "The jury would consider, in assessing the damages, whether the reports which had been proved were sufficient to show he could receive little injury, and in this point of view it did not matter whether the reports were well or ill founded, provided they got into many men's mouths." This is an extreme case, much to be deprecated, but illustrates the principle of the rule, showing the extent of the injury received is to be measured by the actual standing or character of the plaintiff at the time of the defamation complained of.

Under the system of pleading sanctioned by the code, no inducement, setting forth the previous reputation of the plaintiff is necessary in the action of slander. Every woman is presumed to be chaste and every man to be honest until the contrary is shown. It being necessarily implied, the rules of evidence in mitigation of damages must be the same as if such inducement were averred. For these reasons, we think the court below erred in excluding the evidence proposed to be offered by the defendants in their first bill of exceptions.

The testimony of the daughter of the defendants, which is the subject of their second bill of exceptions, was entirely collateral to the issue, and properly excluded.

As this case will be remanded, it will be proper to express the opinion of this court upon the correctness of the decision of the court below upon the plaintiffs' bill of exceptions.

The ruling of the court below was entirely proper in excluding the testimony proposed as evidence in chief, but as it appears from what has preceded, the testimony offered by the defendant in their first bill of exceptions should have been admitted; the evidence offered by the plaintiffs in their bill of exceptions would be material and competent as rebutting testimony.

Judgment reversed, and *procedendo* awarded.

EVIDENCE ADMISSIBLE IN AGGRAVATION OF MITIGATION OF DAMAGES IN SLANDER: See the extended note, on the subject of proper elements of damage in slander, to *Terwilliger v. Wands*, 72 Am. Dec. 426-436; and see *Parkhurst v. Ketchum*, 83 Id. 639.

THE PRINCIPAL CASE IS CITED in *Thompson v. Powning*, 15 Nev. 207, to the point that evidence is admissible on behalf of defendant in slander to repel malice in mitigation, not of actual damages, but of exemplary damages.

SMITH v. TOWNSHEND.

[27 MARYLAND, 268.]

CESTUIS QUE TRUST MAY, DURING CONTINUANCE OF TRUST, maintain bill against trustee to vacate deeds obtained from them by the trustee. An equity, and a right to apply to have the deeds vacated, arises as soon as the trustee departs from his legal duty.

TRUSTEE MAY BE CALLED INTO COURT OF EQUITY BY CESTUIS QUE TRUST, at any and all times, for the purpose of having an accounting of the trust property.

TO SUPPORT PURCHASE BY TRUSTEE FROM CESTUI QUE TRUST of part of trust property, the trustee must divest himself of his character as trustee, and enter into a new and distinct contract with the *cestui que trust*; and it must appear that the latter has the fullest information concerning the transaction and the trust, and that no advantage is taken by the purchaser of information acquired by him in the character of trustee.

CESTUIS QUE TRUST ARE NOT ESTOPPED FROM IMPEACHING DEEDS GIVEN BY THEM to their trustee, by reason of their having taken legacies under his will, which were not made a charge on the particular property derived under the deeds; nor does any case of election arise under such circumstances.

CESTUIS QUE TRUST, WHO SECURE VACATION OF DEEDS EXECUTED BY THEM to their trustee, which convey part of the trust property, are in equity bound to repay to the trustee the purchase-money, and sums expended in repairs and permanent improvements, with interest.

COURT OF CHANCERY HAS JURISDICTION IN MARYLAND under the act of 1785, chapter 72, and supplement, to decree a sale of trust property for the purpose of a division among the parties entitled to it, upon competent and satisfactory proof that the same is not susceptible of partition without loss, and that a sale will be advantageous to the parties.

BILL in equity to vacate and set aside deeds made to one John Hoyer, deceased. The opinion states the material facts.

J. H. Gordon and Thomas J. McKaig, for the appellants.

Oliver Miller, for the appellees.

By Court, BARTOL, J. The relief prayed by the bill in this case is, that certain deeds therein mentioned, made to John Hoyer in his lifetime, shall be vacated and set aside; that

George Smith, executor of John Hoyer, deceased, shall be required to render an account of the trust which was vested in his testator by the will of Paul Hoyer, deceased; and that Edward Hoyer, the new trustee, may render an account of his trust; and that the real and personal estate so devised in trust by Paul Hoyer, and the real estate of which William W. Hoyer died seised, be decreed to be sold, and the proceeds thereof be divided among the complainants and other parties interested; it being alleged in the bill that the same is incapable of a just and equal partition among the parties entitled, and that it will be for their interest and advantage that the same be sold for the purpose of division.

The provisions in the will of Paul Hoyer creating the trust directed that the trust should continue till the youngest child of William W. Hoyer should arrive at lawful age. At the time the bill was filed, Maria D. Hoyer, the youngest child, was a minor; and for that reason the appellants have argued that the bill was prematurely filed, and that to grant the relief prayed would break up and destroy the trust. But the bill charges that John Hoyer, the trustee, violated his duty in purchasing the trust estate and taking the deeds from the *cestuis que trust*; and so far as relief is asked in respect to the deeds, it is no valid objection to the bill that the trust was continuing. So soon as the trustee departed from his legal duty in taking the deeds, the equity arose, and the right to apply to have them vacated. The bill also prays an account, and *cestuis que trust* have at all times the right to call a trustee into equity for the purpose of having an account of the trust property.

We concur in the conclusions expressed in the opinions of the special judges, Mr. Gordon and Mr. Walsh, that the deeds to John Hoyer mentioned in the bill of complaint ought to be vacated and set aside so far as they purport to convey to him the interest and estate of the grantors in the lands devised in trust by the will of Paul Hoyer.

The principles which govern courts of equity in dealing with transactions of this kind are fully stated in Hill on Trustees, 785; 1 Story's Eq. Jur., secs. 321, 322, etc.; in *Fox v. Mackreth*, 2 Bro. C. C. 400; *Ex parte Lacey*, 6 Ves. 626; *Coles v. Trecothick*, 9 Id. 234; and *Morse v. Royal*, 12 Id. 373; and by Chancellor Kent in *Davoue v. Fanning*, 2 Johns. Ch. 252; and have been repeatedly recognized by this court.

In order to support a purchase of the trust estate by a trus-

tee from the *cestui que trust*, it must appear that "the trustee has thoroughly divested himself of that character in the transaction, and entered into a new and distinct contract with the *cestui que trust*, that person having the fullest information on every subject." "There must be no fraud, no concealment, no advantage taken by the trustee of information acquired by him in that character."

Without recapitulating the facts and circumstances of this case as disclosed by the proof, it is very evident that the grantors were ignorant of the quantity and value of the estate they were selling; no information on this subject appears to have been communicated to them by the trustee, who had possession of the title papers, and must be presumed to have known the extent and value of the property.

They looked upon him as their benefactor, and dealt with him under the influence of the most implicit confidence in his benevolent intentions towards them.

According to the evidence, the price paid was greatly inadequate to the value of the property conveyed by the deeds; and this is confirmed by the fact that the grantee promised to make other arrangements in satisfaction. Under such circumstances, the conveyances to the trustee of the trust property cannot be sustained.

In the opinion of this court the complainants are not estopped from impeaching these deeds, by reason of their having taken legacies under the will of John Hoyer. This question is not properly presented by the record, being raised by the answer of Daniel J. Hoyer, filed irregularly after the passage of the decree, and without leave of the court. But inasmuch as the case will be remanded for further proceedings, it is proper to express our opinion on this point.

The question of election does not arise upon the will of John Hoyer. "The intention to raise an election must be clear and manifest from the will itself": *Jones v. Jones*, 8 Gill, 197; *White and Tudor's Lead. Cas. in Eq.* 259 et seq. The legacies are not made a charge on the particular property derived by John Hoyer under the deeds.

He devises only the property that belonged to himself, and does not profess to devise by name or designation the trust property claimed by the complainants; there is, therefore, no inconsistency in their taking the legacies under the will, and claiming the trust estate conveyed by the deeds.

The deeds in question convey also the interest and estate of

the grantors in the lands derived from William W. Hoyer, and the decree passed by the court below declared them to be invalid in that respect also, and set them aside *in toto*. This, we think, was error.

We agree with the opinion expressed by the judge below, that there is no sufficient evidence of a resulting trust in John Hoyer in these lands, and the appellants have failed to establish his title thereto as against William W. Hoyer. But there is no reason why the deeds are not valid and effectual to convey to John Hoyer all the estate held by the grantors therein. The deeds are not assailed as fraudulent in fact; there is no charge in the bill which affects their validity, except in so far as they purport to convey the property held in trust.

As to the rest, there was no disability in John Hoyer to purchase; as to that property he was a stranger to the title, not a trustee; the grantors were *sui juris*, and capable of executing a valid deed, and in the absence of the allegation and proof of fraud or *mala fides* in the transaction, the deeds, so far as they purport to convey the property derived from William W. Hoyer have not been successfully impeached, and must be declared valid. In respect to that property, therefore, the complainants, having no title or interest, have no equity to maintain this bill for the purpose of having a partition or a sale thereof.

We have said that the complainants are entitled to have the deeds canceled so far as they purport to convey the trust property. In granting this relief, it is equitable that the complainants be required to repay the purchase-money, with interest thereon, and that the trustee should be allowed such sums as may have been expended in repairs and improvements of a permanent character; and these items, if such be proved, must enter into the account to be taken by the auditor: 1 White and Tudor's Lead. Cas. in Eq. 116 m.

In estimating the amount of purchase-money actually paid for the trust property, it will be necessary to take proof of the value of the other property conveyed by the deeds, and in respect to which they are valid, and the purchase-money to be refunded will be only the excess, if any, of the price paid beyond the value of the other property which passed by the deeds.

In our opinion, the court of chancery has jurisdiction and power, under the averments in this bill, to decree a sale of the trust property for the purpose of a division among the parties

entitled, upon competent and satisfactory proof that the same is not susceptible of partition without loss and injury to them, and that a sale will be advantageous to them. This question was decided in *Billingslea v. Baldwin*, 23 Md. 85, and rests upon the construction of the act of 1785, chapter 72, and its supplement. See also *Earle v. Turton*, 26 Md. 23.

In the record before us there is no competent and sufficient proof to authorize a decree to sell, the only evidence being that of Mr. Thomas Devecmon, which was taken irregularly under a commission executed without notice. To support the allegations of the bill in this behalf further proof is necessary.

Without affirming or reversing the decree of the circuit court, this cause will be remanded under the act of 1832, chapter 302 (Code, art. 5, sec. 28), for further proceedings, that further proof may be taken, accounts stated, and a decree passed in conformity with the opinion of this court.

Cause remanded.

PURCHASE BY TRUSTEE OF TRUST PROPERTY: See *Buell v. Buckingham*, 85 Am. Dec. 516, and cases cited in the note. Where sales to trustees by *cestuis que trust* are set aside, it is equitable that the latter repay the purchase-money on expenditures for repairs and permanent improvements: *Nichelberger v. Hawthorne*, 33 Md. 595. The burden of proof to show transactions between trustees and *cestuis que trust*, to be fair, is cast upon the party who asserts their validity: *Pairo v. Vickery*, 37 Id. 485. Both of the above cite the principal case.

INTENTION IN WILL TO RAISE ELECTION MUST BE CLEAR AND MANIFEST from the will itself: *McLaughlin v. Barnum*, 31 Md. 442; *Barbour v. Mitchell*, 40 Id. 167, both citing the principal case.

SMITH v. McATEE.

[27 MARYLAND, 420.]

WHERE MARRIED WOMAN TOOK BY DEVISE UNDIVIDED INTEREST IN REAL ESTATE, and a bill was filed for the sale of the land for partition, which was answered by the husband disclaiming all interest in the property, and the decree of sale provided that the portion of the proceeds allotted to the wife should be deemed her separate estate, free from any claim or control of her husband or his creditors, and her portion of the proceeds was accordingly credited to her sole and separate use, and paid over to her attorney, this fund could not be attached for a debt of the husband.

RECORD OF PARTITION SUIT IS ADMISSIBLE TO SHOW THAT FUND ATTACHED FOR HUSBAND'S DEBT was derived from a sale of the wife's realty, and that the conversion from realty into personalty was intended not to prejudice the rights of the wife. This forms an exception to the general rule, that judgments and decrees bind only parties and privies.

FUND DERIVED FROM PARTITION SALE IN MARYLAND OF WIFE'S INTEREST IN REALTY, which is not attachable in that state for the husband's debt, cannot be so attached there on the ground that the domicile of the husband and wife is in Illinois, under the laws of which state the husband is entitled to all the personal property of the wife.

COMITY IS OVERRULED BY POSITIVE LAW, and it is only in the silence of any particular rule, affirming, denying, or restraining the operation of foreign laws, that courts of justice presume a tacit adoption of them by their own government.

NO STATE WILL SUFFER LAWS OF ANOTHER TO INTERFERE WITH HER OWN; and in the conflict of laws, when it must often be a matter of doubt which shall prevail, the court which decides will prefer the law of its own country to that of the stranger.

COURTS OF STATE HAVE PERFECT JURISDICTION OVER ALL PERSONAL PROPERTY as well as real, within its limits, belonging to a married woman, and they have a right to protect both from the debts of the husband; if, therefore, the legislative enactments of one state in regard to the property of the wife conflict with the laws of another state in which the husband and wife are domiciled, it cannot be made a question in the courts of the former which shall prevail; but where there is no constitutional barrier, these courts are bound to observe and enforce the statutory provisions of their own state.

CREDITOR SEEKING TO SUBJECT TO PAYMENT OF HUSBAND'S DEBT a fund held for the sole and separate use of the wife will be governed by the *lex fori*, and such judgment will be rendered as that law authorizes.

ATTACHMENT, served upon Smith as garnishee of Leister. The opinion states the case.

James S. Franklin and Oliver Miller, for the appellant.

R. H. Alvey, for the appellee.

By Court, CRAIN, J. The attachment in this case was issued by the appellee to affect the proceeds of sale of the real estate of the wife to pay the debt of the husband. The facts as presented in the record are, that Nicholas Leister and wife were citizens of this state until August, 1854, when they removed to Illinois, where they resided when this attachment issued. Before removing from the state, Leister became indebted to the appellee, who has always resided in Washington County, Maryland. The fund in controversy was derived from the sale of the real estate of Mary Gehr, the mother of Sarah Leister, the wife of Nicholas.

Mary Gehr died in 1855, leaving real estate in Washington County, and by her last will and testament devised a child's share of said estate to Sarah, the wife of Nicholas. In January, 1856, a bill was filed in the circuit court for Washington County against Leister and wife, and the other devisees, for the sale of the real estate for partition. The bill was answered by

Leister and wife. In their answer, Sarah, the wife of Nicholas, claimed her portion of the estate as her sole and separate estate, free from the debts of her husband, and insisted that the same should not be divested from her by a sale thereof. Nicholas, the husband, disclaimed all right, title, or interest at law or in equity to any portion of the estate of Mary Gehr by virtue of his marriage with the said Sarah, or otherwise. A decree was passed in the cause on the 12th of August, 1856, for the sale of the property, and in the decree it was provided that the proportion of the proceeds of the sale of the property allotted to Sarah should be deemed her separate estate, for her sole and separate use and benefit, free from any claim or control of her husband or his creditors. After the sale of the property, the amount of the proceeds due Sarah was credited to her sole and separate use, and paid over to the appellant as her attorney, when it was attached by the appellee to pay the debt of her husband.

At the trial of the cause, two bills of exception were taken by the appellant: the first to the admissibility of evidence, and the second upon the granting of the plaintiff's and the rejection of the defendant's prayers. To arrive at a proper solution of the questions to be determined by this appeal, we must ascertain the rights of Sarah, the wife, under the will of her mother, and the proceedings and decree of the court, and whether the proceeds of the estate audited to her, and received by Mr. Smith as her attorney, were liable to be attached in our courts for the payment of the husband's debt. In 1841, the legislature, recognizing the just and equitable right of the wife to the enjoyment of her real estate, passed a law to protect the real estate of the wife from the debts of the husband. This legislation in favor of the wife against the creditors of the husband so favorably impressed itself upon the public mind that by the thirty-eighth section of the third article of the constitution of 1851 the legislature was required to pass laws necessary to protect the property of the wife from the debts of the husband during her life, and for securing the same to her issue after her death. The legislature, acknowledging the wisdom of this provision, in obedience to the mandate of the constitution, enacted the law of 1853, chapter 245. That act provides that all the property of the wife acquired or received after her marriage, by purchase, gift, grant, devise, bequest, or in a course of distribution, shall be protected from the debts of the husband, and not in any way be liable for the payment thereof.

And to effect the objects of the law, the wife was given the benefit of all such remedies for her relief and security as then existed or should be devised in the courts of law or equity, without the necessity of the interposition of a trustee. The object contemplated by this law is too clear for doubt; by its enactment the legislature intended to give full protection and security to the property of the wife against the creditors of the husband, as previous to its enactment the cases of *Peacock v. Pembroke*, 4 Md. 280, and *Turton v. Turton*, 6 Id. 375, had been decided by this court, and in each case the property was adjudged to be the husband's, and subject to the payment of his debts. This act soon after its passage received a judicial interpretation in the case of *Unger v. Price*, 9 Id. 552. In that case, Mrs. Unger had sold her potential right of dower, and invested the money in personal property, and it was held by this court to be exempted from the debts of the husband.

The case of Mrs. Leister is equally strong, and comes within the principle settled in *Unger v. Price*, *supra*. She was the devisee of real estate, and with the consent of her husband the proceeds of sale of the property under the decree of a court of equity were held to her sole and separate use, so audited to her, and paid over to the appellant. But the appellee insists that the proceedings and decree were not admissible evidence against him, because they were *res inter alios acta*. We admit, as a general rule, that judgments and decrees are evidence binding only between parties and privies. But there are many exceptions to this rule, and we are of opinion that this case forms one of the exceptions, and comes within the principle settled by this court in the case of *Key v. Dent*, 14 Md. 98. The record was introduced in this case to show how the fund was derived, and that the conversion from realty into personalty was not to prejudice the rights of the wife. For that purpose, according to the decision in *Key v. Dent*, *supra*, and the authorities relied on by Justice Eccleston, who delivered the opinion of the court, the record was evidence: *Head v. McDonald*, 7 T. B. Mon. 207; 4 Phillips on Evidence, 920, 921, 977, ed. of 1843. The record was confirmatory of the answers of the garnishee, and proof that the decree was had as there set forth. It was a decree of a court of competent jurisdiction, which in the exercise of its powers as a court of chancery settled the property to the sole and separate use of Mrs. Leister. And although we find this right of the wife to her property protected in this state by public

policy, by statute, and by a decree of a court of equity, yet it was earnestly contended by the learned counsel for the appellee that a creditor of the husband had a right to attach this fund in our courts of justice for the debt of the husband, as by the laws of Illinois, where the husband and wife resided, the husband was entitled to all the personal property of the wife, and that by virtue of this law of the domicile the fund was vested in the husband. And he claimed this right to divest the wife of her property by the law of the domicile, on the ground of comity. In this case we cannot sanction such a right, for it has been decided that comity is overruled by positive law, and that it is only in the silence of any particular rule, affirming, denying, or restraining the operation of foreign laws, that courts of justice presume a tacit adoption of them by their own government: *Gardner v. Lewis*, 7 Gill, 395. It is certainly competent for any state to adopt laws to protect its own property as well as to regulate it, and "no state will suffer the laws of another to interfere with her own; and in the conflict of laws, when it must often be a matter of doubt which shall prevail, the court which decides will prefer the laws of its own country to that of the stranger": Story's Conflict of Laws, sec. 28. The courts of our state have perfect jurisdiction over all personal property as well as real, within its limits, belonging to the wife, and they have a right to protect both from the debts of the husband. If, therefore, our legislative enactment in regard to the property of the wife and the laws of Illinois conflict, it cannot be made a question in our own courts which shall prevail. "Where there is no constitutional barrier, we are bound to observe and enforce the statutory provisions of our own state": *Davis v. Jacquin*, 5 Har. & J. 109; *Gardner v. Lewis*, 7 Gill, 395.

As this fund by our laws is held by the appellant for the sole and separate use of Mrs. Leister, a creditor of the husband seeking a remedy against him in our courts must be governed and regulated by our laws; for Justice Story says: "A person suing in this country must take the law as he finds it, and wherever a remedy is sought, it must be administered according to the *lex fori*; and such a judgment is to be given as the law of the state where the suit is brought authorizes": Story's Conflict of Laws, secs. 571, 572. And in this court, in the case of *Wilson v. Carson*, 12 Md. 75, Le Grand, C. J., says: "The recognition of the laws of another state, in the administration of justice in this, is not a right *stricti juris*; it depends

entirely on comity, and in extending it, courts are always careful to see that the statutes of their own state are not infringed, to the injury of their own citizens."

We think these authorities decisive of the question, and that the appellant has a right to rely in a court of law upon the title of Mrs. Leister to the fund in controversy. Her right had not been divested by her own act or by operation of law, and the fund in his hands was not liable to be attached by the creditor of the husband.

The views which we have expressed of the legal propositions governing this case are conclusive upon the right of the plaintiff to recover, and it is unnecessary to examine the first bill of exceptions to ascertain whether the evidence offered by the defendant, of the laws of Illinois touching the rights of husband and wife, were admissible or not. It follows from what we have said that the instructions given by the court at the instance of the plaintiff, and contained in the second bill of exceptions, were erroneous. The prayers asked by the defendant's counsel embrace, in our opinion, the true theory of the law of the case, and ought to have been granted. For these reasons we reverse the judgment of the circuit court.

Judgment reversed without *procedendo*.

THE PRINCIPAL CASE IS CITED in *Oswald v. Hoover*, 43 Md. 371, to the point that the relation of debtor and creditor may exist between husband and wife in equity. In *Noonan v. Kemp*, 34 Id. 78, it is cited to the point that a creditor seeking to subject a wife's separate fund to a husband's debt will be governed by the *lex fori*, and be entitled to such judgment only as that law authorizes.

DAVIS v. HELBIG.

[27 MARYLAND, 452.]

LEGISLATIVE ACTS ARE PRESUMED TO BE CONSTITUTIONAL, and their effect and operation can only be impeded by judicial powers, when they infringe some of the provisions of the constitution, or violate the vested rights of the people. Legislative acts are never pronounced unconstitutional or void in doubtful cases.

LEGISLATIVE ACT EMPOWERING COURT OF EQUITY TO DECREE PARTITION of real property in a particular case is constitutional and valid in Maryland.

LEGISLATIVE ACT EMPOWERING COURT OF EQUITY TO DECREE SALE OF PROPERTY in a particular case, provided they are satisfied by proof that it will be advantageous to the infant owners, confers jurisdiction on the court in Maryland.

CONSTITUTIONAL POWER OF MARYLAND LEGISLATURE TO DECREE SALE OF MINOR'S REAL ESTATE in particular cases is undoubted.

CONVERSION OF MINOR'S REALTY INTO PERSONALTY DOES NOT DEPRIVE the minor of his property in any way, and hence the legislature may provide for such conversion in particular cases.

TITLES OF BONA FIDE PURCHASERS OF REAL PROPERTY CAN ONLY BE AVOIDED for substantial legal defects, and will not be affected by irregularities in the proceedings.

EJECTMENT. One James Hook died seised of the real property in controversy, but prior to his death executed a will devising, after the death or marriage of his wife, a life estate to his daughter, Matilda Jane Davis, the remainder to be divided between her children, and appointed his two sons trustees of the share devised to her. By an arrangement between the widow and children of the testator who were dissatisfied with the provisions of the will, a family arrangement for a division of the estate was entered into, and it was agreed that application should be made to the county court as an equity court to settle the remainder limited by the will to the children of Matilda Jane Davis in such manner as would protect their rights and interests in the premises, and to appoint Thomas D. Davis, the husband of Matilda, her trustee in lieu of her brothers. A bill was therefore filed, which, among other things, alleged that a partition of the property had been made by persons selected by the parties in interest, and prayed that the same might be ratified and confirmed. After the return of the commission appointed by the court to take testimony, an order was passed directing a commission to issue to make partition among the parties; and the court, after the return of the commission, passed its order ratifying and confirming the partition, and adjudging that Mrs. Davis and her children should hold in severalty the portion allotted to them by the return of the commission, and appointed Thomas D. Davis her trustee. Shortly after his appointment he filed a petition, setting forth the aforesaid decree of partition, as also showing that pending the proceedings an "act for the relief of John L. Hook and others, devisees of James Hook, late of Alleghany County, deceased," had been passed, whereby the court was empowered to make partition of the real estate of the said James Hook; and upon the petition of any person on behalf of Mrs. Davis and her children, to sell or to let their portion, the court being satisfied that it would be advantageous for the parties so to do. Upon this petition, the court passed an order appointing the petitioner a trustee to sell or lease the said real estate. In

pursuance of this order, the trustee sold and conveyed certain lots to one Thomas Davis, who afterwards sold and conveyed parts of these lots, being the same sought to be recovered in this action, to James O'Dair, from whom the appellee purchased. The plaintiff prayed the court to instruct the jury as follows: 1. That if they find from the evidence in the cause that the matters and things admitted in this cause are true, and that the proceeding in the case of partition offered in evidence were had, then the plaintiffs are entitled to recover, notwithstanding that they may find that the petition of Thomas D. Davis, offered in evidence, for Matilda Jane Davis and her children, was filed and the proceedings thereunder had, as offered in evidence by the defendant; 2. That the petition of Thomas D. Davis for Matilda Jane Davis and her children, now offered in evidence, and the proceedings thereunder, if they shall believe them to have been had, and the deed of Thomas D. Davis under said proceedings, now in evidence, do not prevent them from recovering the lands sued for in this action. And the defendant offered the following prayer: That although the jury shall find all the facts admitted in this case to be true, still the bill of complaint, proceedings, decrees, and deed of the said Thomas D. Davis as trustee, had in said case, and now offered in evidence, divest the legal title to the lots in controversy out of the lessors of the plaintiffs if the jury shall find that the land now sued for is the same reported by Thomas D. Davis, trustee, as sold to Thomas Davis, and conveyed to Thomas D. Davis as trustee, to Thomas Davis, and that it is also part of the lands set off in severalty to Matilda Jane Davis and her children, and the plaintiffs are not entitled to recover in this case. The court rejected the prayers of the plaintiffs, and granted the prayer of the defendant. To this ruling the plaintiffs excepted, and the verdict and judgment being against them, they appealed.

J. H. Gordon and William Walsh, for the appellant.

William J. Read and Thomas J. McKaig, for the appellees.

By Court, CRAIN, J. Two questions present themselves for the consideration of the court on this appeal: 1. Whether the act of the legislature passed at December session, 1845, chapter 253, entitled "An act for the relief of John L. Hook and others, devisees of James Hook, late of Alleghany County, deceased," was a proper exercise of legislative power; and 2. If so, whether the power conferred by the act on the county

court of Alleghany gave that court jurisdiction, and authorized the decree by virtue of which the property in controversy was purchased. The three sections of the act very clearly designate the reason and object of its enactment; the authority granted by the act was twofold: to effect a valid division of the real estate among the devisees of James Hook, on their application for that purpose, at that time depending in the court; and also to transmute the share of the real estate to be allotted to Mrs. Davis and her children into personal property or money, provided the court was satisfied it would be beneficial to all who were interested. The acts of the legislature are presumed to be constitutional, and it is only when they manifestly infringe some of the provisions of the constitution or violate the vested rights of the people that their effect and operation can be impeded by judicial power; for the act of a legislature is not pronounced unconstitutional or invalid in a doubtful case. The power to decree the sale of real estate of minors in special cases was frequently exercised by the legislature of this state and the power thus exercised was never successfully doubted or questioned by the profession or the courts: See *Dorsey v. Gilbert*, 11 Gill & J. 87. The increasing necessity of these special acts caused the legislature to enact the statutes of 1816, chapter 139, and 1818, chapter 133. These acts conferred general powers on the courts to decree sales of the real estates of infants, provided they were satisfied it would be for the interest and benefit of the minors. The constitutional right of the legislature to pass these special and general laws was conceded, as the state was considered the general guardian and protector of minors who were disabled to act for themselves, and the legislature, exercising this tutelary power over the persons and property of infants, claimed and exercised the right to provide by public or private acts for converting real estate in which they had vested or contingent interests into personal property and securities when necessary for their benefit.

It was contended by one of the counsel for the appellants, that, in virtue of the twenty-first section of the bill of rights, the legislature was prohibited from passing this act, as by that section "no freeman ought to be deprived of his property without the judgment of his peers, or by the law of the land." Surely this act cannot be considered repugnant to that clause in the bill of rights; it did not propose to deprive the minors of their property, but was passed on the application

of their father, representing that a sale of the property would be beneficial to the children and promotive of their interest, and it was therefore, we think, a just and proper subject for the exercise of the authority of the legislature as *parens patriæ*.

The commuting of realty into personalty has never been held as depriving the children of their property; by the exercise of such a power minor children are enabled to derive subsistence, comfort, and education from their property, which otherwise might be wholly useless and unproductive; and this power is asserted by Justice Grier, in delivering the opinion of the court in the case of *Florentine v. Barton*, 2 Wall. 210, where he says: "Statutes are found in almost every state in the Union giving authority to guardians to sell the estates of their wards, subject to the supervision and approbation of a court, and the power to grant such special authority to guardians has been generally admitted." This is not like the case of *Crane v. Meginnis*, 1 Gill & J. 463 [19 Am. Dec. 237]. In that case the legislature undertook to appropriate the money of Meginnis to Crane, and it was therefore an exercise by the legislature of judicial power, and repugnant to the constitution. It was an attempt on the part of the legislative department of the government to encroach on a co-ordinate department, and for that reason the third section of the act in that case was declared by the court a nullity. Now, can it be said that this act of assembly has deprived any man of his property, or applied it to any other use than that of the children? The sale of the property was in virtue of the exercise of the power vested in the legislative department, and which was not prescribed by the federal or state constitution. The views which we have expressed in this opinion, of the constitutional power of the legislature to pass this act, are fully sustained by adjudged cases of our sister states. In *Rice v. Parkman*, 16 Mass. 326, it was decided that "the legislature have power to license the sale of the real estate of minors, notwithstanding they have delegated the same power to the judicial courts." In *Leggett v. Hunter*, 19 N. Y. 463, Allen, J., said: "The courts have established this power by judicial decisions; and I think the legislature also had the power to direct, as it did by the act in question, a sale of the premises, so as to bind the interest of any posthumous children of the daughters, who on their birth would become interested in the remainder created in the will." And in *Norris v. Clymer*, 2 Pa. St. 277, Chief Justice Gibson,

commenting on the same question, says: "The act is constitutional, and the court will enforce a contract of purchase from the trustees." Was the jurisdiction by this act conferred on the county court of Alleghany to decree a sale of the property in controversy? The adult heirs of James Hook under the will had filed their bill for a division of the real estate among his devisees, when they applied for this special act, to enable them to make the division valid, not only against the children *in esse* of Matilda Jane Davis, the tenant for life, but also against the after-born children. We are satisfied, looking at the three sections of the act, that it was the manifest intention of the law that the whole interest of Matilda Jane Davis and her children in this property was to be considered and acted upon by the court, for by the act the court was authorized in their discretion to order and direct such amendments or modifications of the bill or other proceedings as they deemed necessary and proper to carry into effect the provisions of the act. It is one entire act, and the provisions are not limited to the first and second sections, but are equally applicable to the third section. All the parties interested in the property were before the court, and after the ratification of the division among the devisees, the petition for the sale of the portion allotted to Matilda Jane Davis and her children was filed, in pursuance and by authority of the third section of the act. According to the just construction of this act, no power was conferred on the court to decree a sale of this property, unless they were satisfied by proof that it would be advantageous to the infants.

The court expressly state in their decree that it is based on the act of assembly and the affidavits filed in the proceedings; and the money arising from the sales was ordered to be brought into court to be invested, or otherwise disposed of, under the direction of the court. So that every safeguard was observed by the court to protect the interest of the children. The legislature, having the right to pass the law, also directed how the act should be done; and the whole proceeding was under the special act, and independent of the general acts on the subject, and not to be controlled or governed by them; and the only question to be adjudicated by the court was, whether the interests of the minors would be advanced by the sale. But it was contended by the counsel for the appellants that the act and petition did not make a case of jurisdiction in the court. It is said in *Tomlinson v. McKaig*, 5 Gill, 256,

that the true test of jurisdiction will, in all cases, be found on the determination of the question whether a demurrer will not lie to a bill. Tried by this test, we are of opinion that the court would have determined that the act conferred jurisdiction, as "the power to hear and determine a cause is jurisdiction; it is *coram judice*, whenever a case is presented, which brings this power into action": *United States v. Arredondo*, 6 Pet. 709. Admitting the jurisdiction, a decree without proof, or upon insufficient proof, is one in the exercise of jurisdiction, and can only be the subject of appeal or review. As this court said in *Hunter v. Hatton*, 4 Gill, 122 [45 Am. Dec. 117], "they are irregularities and errors which could only be taken advantage of by the party aggrieved by them on a rehearing, a bill of review, or an appeal in the cause in which they are found." A court cannot examine into the merits of a decree collaterally, if it had jurisdiction; and in *House v. Wiles*, 12 Gill & J. 338, a record was admitted in evidence of the sale of infants' lands under a decree, although there was no evidence to prove the allegations except the answer of the guardian of the infants. And in *Kent v. Taneyhill*, 6 Id. 1, and *Harris v. Harris*, 6 Id. 111, it was held that the answer of the guardian of an infant is not evidence against him. The appellee in this case claims under a judicial sale; and the soundest principles of justice and policy seem to demand that every reasonable intendment should be made to support the titles of *bona fide* purchasers of real property, and courts of justice are not disposed to impair their safety by insisting on matters of form; they can only be avoided for substantial legal defects. These principles of the law, applicable to judicial sales, have been frequently recognized and adopted by this court; and in the case of *Elliott v. Knott*, 14 Md. 121, it was ruled that an execution and sale of the real estate of a defendant in a judgment was valid against his infant child, although the defendant was dead on the day the *fi. fa.* was tested and issued; and this judgment of the court was predicated on the case of *Jackson v. Robins*, 16 Johns. 582, which approved of the principle enforced by Lord Chancellor Redesdale in the case of *Bennett v. Hammell*, 2 Schoales & L. 566; in that case, the chancellor said that "there were irregularities in the proceedings, which he pointed out, and that the decree was erroneous, inasmuch as the infant ought to have a day to show cause against the decree when he comes of age. But he held that this was not to affect the purchaser's title.

It would be too much, he thought, to say that a purchaser under a decree of that description could be bound to look into all these circumstances, and to go through all the proceedings, from the beginning to the end." Chief Justice Le Grand, after quoting this opinion, with approbation, adds, "that courts of justice guard and maintain with jealous vigilance the titles of purchasers acquired under judicial sales."

For these reasons, we are of opinion that the prayers of the appellants were properly rejected by the court below, and concur with the court in the prayer granted at the instance of the defendant, and therefore affirm the judgment.

Judgment affirmed.

STATUTES ARE PRESUMED TO BE CONSTITUTIONAL: *Olmstead v. Camp*, 89 Am. Dec. 221, and note 229.

THE PRINCIPAL CASE IS CITED in *Davidson v. Koehler*, 79 Ind. 412, to the point that legislation of the kind involved in the statute under question in the principal case is now generally considered constitutional.

LONG v. BUCHANAN.

[27 MARYLAND, 502.]

MERE LICENSE IS REVOCABLE, BUT WHEN CONNECTED WITH INTEREST OR GRANT, the licensor cannot revoke it so as to defeat the grant or interest to which it is incident.

LICENSE TO ENTER PLAINTIFF'S PREMISES, COUPLED WITH INTEREST, SO AS TO BE IRREVOCABLE, results from an agreement by the terms of which plaintiff agreed to sell to the defendant her crop of corn, and to put it in her crib for him for measurement, from which he was authorized to take it; the corn to be settled for by a credit upon a mortgage, which he and another held against her, at a price larger than the then current prices in the market, and a receipt to be so given; and the corn was so placed in the crib, and the defendant invited to go for it, or notified to take it away at his pleasure; and for an entry under the agreement, the defendant is not guilty of trespass.

TRESPASS *quare clausum fregit* for entering plaintiff's close. Defendants pleaded a sale of corn by plaintiff to them, and a license to enter plaintiff's premises to remove it. The substance of the contract is stated in the opinion. Plaintiff, upon the trial, asked the following instructions: 1. If the jury shall find from the evidence in the cause that the corn mentioned in the declaration was sold by the plaintiff to Simon Long, one of the defendants, and that it was to be measured on the land and premises of the plaintiff, and that after the making

of said contract for the corn the plaintiff notified Simon Long that he would not remove or take it away, and that after such notice, Simon Long sold the corn to Benjamin Long and the other defendant, and at the time of the sale Simon Long informed Benjamin Long of the fact that such notice had been given him by the plaintiff not to take away or remove the corn, and that afterwards Benjamin Long entered upon the farm of the plaintiff, and without his consent and forcibly took the corn without measuring it, as agreed upon, and carried the same away, then the defendants' plea of leave and license pleaded in this case is not sustained, and Benjamin Long is liable for trespass for entering the land of the plaintiff, breaking open the crib, and carrying away the corn; 2. That if the jury find that Simon Long, after taking away the corn, received an account of its quantity from Benjamin Long, and settled with Benjamin for it, then Simon Long is liable as a trespasser for the entry upon the land and premises, and the taking away of the corn; 3. That if the jury find the facts stated in the first of the foregoing prayers, then the written agreement given in evidence by the defendants, allowing them to enter upon the land, and take away the corn, is not sufficient evidence of an accord and satisfaction as to the entry upon the land and premises of the plaintiff, and the breaking and forcible entry into the crib. The defendant then prayed the court for the following, among other instructions, and which are referred to by number in the opinion: 2. If the jury find from the evidence that plaintiff in October, 1863, owned the corn and close mentioned in the declaration, and was then indebted to Simon Long and Shafer, to secure which indebtedness plaintiff executed a mortgage upon said corn, and that before the trespass complained of the plaintiff sold the corn to Simon Long, under an agreement that the crop should be delivered by plaintiff's placing it in a crib for Simon Long upon said close, and that the price of the corn should be allowed as a credit upon the mortgage debt, then the defendant, Benjamin Long, as Simon Long's successor, was entitled to enter the close for the purpose of taking and carrying away the corn, and that if the entry and breaking were made for such purpose, the plaintiff cannot recover; 3. If the jury find the indebtedness and execution of the mortgage as aforesaid, and that at the same time plaintiff was the owner of the crop of corn, and shall further find the sale and agreement as aforesaid, and that plaintiff agreed that Simon Long might

enter to take away the corn from the crib at his pleasure, and that defendant Long, or his successors, did so enter with that intention, then the plaintiff cannot recover; 4. This instruction requested and refused was the same as the last, except in being based upon an agreement that defendant Long, or his successor, might enter at any time for the purpose of taking away the corn. The remaining facts appear in the opinion.

Andrew K. Syster, for the appellant.

W. Motter, for the appellee.

By Court, WEISEL, J. The appeal in this case is by one of three co-defendants in an action of trespass *quare clausum fregit*, the verdict and judgment being against him alone. The only exception in the case is to the granting by the court below of the plaintiff's prayers, and the refusal to grant the second, third, and fourth prayers of the defendants. The first and third prayers of the plaintiff, in our judgment, were correctly granted. The second need not be passed upon, as Simon Long was not affected by the verdict and judgment. The principal defense was the leave and license pleaded in the second plea. The three prayers of the defendants, refused by the court below, present this to our consideration; and it is contended that the evidence adduced by the defendants, and relied upon to support them, not only proved the license, but disclosed the fact that it was coupled with an interest that rendered it irrevocable; and if so, the prayers contained correct propositions of law, and should have been granted by the court. It appears by the defendants' proof that the plaintiff had agreed with the defendant Simon Long, not simply to sell him the corn, but to put it in her crib for him, for measurement, from which he was privileged to take it; that the corn was to be settled for by a credit upon a mortgage he held against her, and a receipt so given, and that a larger price was paid for it than the then current prices in the market; that the corn was placed in the crib, and the said Simon invited to go for it, or had notice to take it away at his pleasure. This state of facts, if proved to the satisfaction of the jury, would constitute a license coupled with an interest or grant which rendered it irrevocable.

Care must be taken not to confound this case with those of a class in which the license, though coupled with an interest, is nevertheless of a revocable nature, and would furnish no

justification to the licensee for acts done after revocation. These are cases where the interest partakes of the realty, or is of such a nature as to require for its validity a deed, or a compliance with the statute of frauds, as an easement, right of way, or other interest in, upon, or out of the land itself. Of this class is the case of *Wood v. Leadbitter*, 13 Mees. & W. 838, cited by the counsel on both sides in the argument. It was very fully considered by the court of exchequer, and all the English cases ably reviewed by Baron Alderson in the opinion delivered in it. The note to the case in Hare and Wallace's edition points to the leading American decisions, to which we may add the cases of *Hays v. Richardson*, 1 Gill & J. 366, and *Addison v. Hack*, 2 Gill, 221 [41 Am. Dec. 421], as bearing upon the question. From these we deduce these principles, that a license, according to Vaughan, C. J., "properly passeth no interest, nor alters or transfers property in anything, but only makes an action lawful which without it had been unlawful"; as a license to hunt in a man's park or to come into his house. But a license to hunt in a man's park and carry away the deer killed to his own use, or to cut down a tree and carry it away the next day, is something more than a mere license; so far as the taking away of the deer killed or the tree cut down, it is a grant. A mere license is revocable. But where it is connected with a grant, the party who has given it cannot in general revoke it, so as to defeat the grant to which it was an incident.

In all cases of a license by parol, where the grant is of a nature capable of being made by parol, the license is irrevocable. But where the license by parol is coupled with a parol grant of something which is incapable of being granted otherwise than by deed or by compliance with a statutory requirement, there the license is a mere license, because the grant annexed to it wants legal validity; and like all mere licenses, it is revocable. These distinctions are clearly illustrated in the following extract from the opinion referred to: "Thus a license by A to hunt in his park, whether given by deed or by parol, is revocable; it merely renders the act of hunting lawful, which without the license would have been unlawful. If the license be, as put by Chief Justice Vaughan, a license not only to hunt, but also to take away the deer when killed to his own use, this is in truth a grant of the deer, with a license annexed to come on the land; and supposing the grant of the deer to be good, then the license would be irrevocable."

cable by the party who had given it; he would be estopped from defeating his own grant, or act in the nature of a grant. But suppose the case of a parol license to come on my lands, and there to make a watercourse to flow on the land of the licensee. In such a case there is no valid grant of the watercourse, and the license remains a mere license, and therefore capable of being revoked. On the other hand, if such a license were granted by deed, then the question would be, on the construction of the deed, whether it amounted to a grant of the watercourse; and if it did, then the license would be irrevocable": *Wood v. Leadbitter*, 13 Mees. & W. 845.

The case of *Wood v. Manley*, 11 Ad. & E. 34, cited and relied on by the appellant, is one coupled with an interest, grantable by parol, and irrevocable. The hay in question had been sold by the plaintiff's landlord under a distress for rent, and the conditions of the sale were, that the purchaser might leave it on the close until Lady Day, and come in the mean time onto the close, and from time to time as often as he should see fit, and remove it. To these conditions the plaintiff assented, but before the day locked up the close to prevent the ingress of the purchaser and the removal of the hay. The defendant, the purchaser, broke open the gate, and carried away the hay. He obtained the verdict, under the instructions of Erskine, J., on the ground that the license was irrevocable. On a motion to set aside the verdict, on the ground that the license was revocable and revoked, the court of queen's bench refused to grant a rule; and, Baron Alderson adds (p. 853), "we think quite rightly. This was a case not of a mere license, but of a license coupled with an interest. The hay by the sale became the property of the defendant, and the license to remove it became, as in the case of the tree and the deer, put by Chief Justice Vaughan, irrevocable by the plaintiff, and the rule was properly refused. The case was analogous to that of a man taking my goods, and putting them on his land, in which case I am justified in going on the land and removing them: *Vin. Abr.*, tit. Trespass, H, a, 2, pl. 12; and *Patrick v. Colerick*, 3 Mees. & W. 483." See also *Ex parte Coburn*, 1 Cow. 568; and *Barnes v. Barnes*, 6 Vt. 388.

In the case of *Moats v. Witmer*, 3 Gill & J. 118, the plaintiff recovered because the defendant entered and carried off both grain and straw from the premises, when he was entitled only to enter and thrash the grain there, carry off the grain, and leave the straw. If he entered with the intent (to be found

by the jury) to carry away the grain in the straw and thrash it off the premises, his right of ingress and egress no longer protected him, and he stood in the predicament of any other trespasser. We think the case under consideration cannot be distinguished from that of *Wood v. Manley*, 11 Ad. & E. 34, followed in its principles by the other cases referred to, if the facts relied upon by the defendants as to the character of the license were found by the jury, and that the same law is applicable to it. The prayers of the defendants that were refused by the court below presented this hypothesis of the case, and it was not necessary that they should refer to the facts relied upon by the plaintiff to prove a revocation of the license; for notwithstanding them (the license upon the defendant's hypothesis being irrecoverable), the plaintiff would not be entitled to recover if the others stated were found to exist. Nor is there anything in them to conflict with the first prayer of the plaintiff. These prayers ought therefore to have been granted, and we must reverse the judgment.

Judgment reversed, with leave to the plaintiff to take out a *procedendo*.

LICENSE WHEN EXECUTED OR COUPLED WITH INTEREST is not revocable so as to defeat the grant or interest to which it is incident: See *Foster v. Browning*, 67 Am. Dec. 505, and cases cited in note; *Beatty v. Gregory*, 85 Id. 546; and see the extended note to *Hasleton v. Putnam*, 14 Id. 166. If one sells goods, and gives to the purchaser a license to enter and take them, he cannot, when the licensee attempts to exercise his right, refuse to allow him to do so, and claim that he has revoked such license: *Walsh v. Taylor*, 30 Md. 599, citing the principal case.

STATE v. BELL.

[27 MARYLAND, 675.]

PROSECUTOR CANNOT BE COMPELLED TO ELECT ON WHICH OF SEVERAL COUNTS OF INDICTMENT he will proceed, when they do not charge distinct offenses, but are introduced solely for the purpose of meeting the evidence as it may transpire, the charges being substantially for the same offense.

MOTION TO COMPEL PROSECUTOR TO ELECT ON WHICH OF SEVERAL COUNTS OF INDICTMENT he will proceed may be made at any time during the trial.

ERROR IN DECIDING MOTION TO COMPEL PROSECUTOR TO ELECT on which of several counts of an indictment he will proceed cannot be reviewed or corrected by the appellate court, as such motions are addressed to the discretion of the lower court.

INDICTMENT against W. H. Bell, containing five counts as follows: 1. That he did, on the 20th of October, 1866, etc., make an assault with an intent John T. Leverall feloniously, willfully, and of his malice aforethought to kill and murder, contrary, etc.; 2. That he did, on that day, etc., with a certain pistol, loaded with gunpowder and ball, unlawfully shoot at John T. Leverall, with intent John T. Leverall to maim, contrary, etc.; 3. That he did, on that day, etc., with a certain other pistol loaded with gunpowder and ball, unlawfully shoot John T. Leverall, with intent to disfigure the said John T. Leverall, contrary, etc.; 4. That he did, on that day, etc., with a certain other pistol loaded with gunpowder and ball, unlawfully shoot, with intent John T. Leverall to disable, contrary, etc.; 5. That he did make an assault, and the said John T. Leverall beat, bruise, wound, and ill treat, so that his life was greatly despaired of, and other wrongs, etc., against, etc. In other respects the opinion states the case.

Alexander Randall, attorney-general, for the appellant.

By Court, BARTOL, J. The only error assigned in this record is the action of the circuit court in requiring the state's attorney to elect upon which of the first four counts, in connection with the fifth or last count, he would proceed to trial. "The application for a prosecutor to elect is an application to the discretion of the judge, founded on the supposition that the case extends to more than one charge, and may therefore be likely to embarrass the prisoner in his defense": *Regina v. Trueman*, 8 Car. & P. 727, 34 Eng. Com. L. 605. In this case the application was made after the traverser had pleaded to the indictment, and the jury had been sworn, and is alleged to have been made too late; this objection, however, was properly waived by the attorney-general in the argument. In *Burk v. State*, 2 Har. & J. 426, it was decided that "after a prisoner has pleaded generally to an indictment having two counts, the jury may be sworn and charged upon one of the counts only, to the exclusion of the other." It follows from this that in a case where the prosecutor ought to be required to elect, the motion for that purpose may be made at any time during the trial.

"When the indictment contains several counts, charging two or more distinct offenses, the court will, on motion, order it to be quashed, or compel the prosecutor to elect on which charge he will proceed. But such election will not be required

to be made when several counts are introduced solely for the purpose of meeting the evidence as it may transpire, the charges being substantially for the same offense": Wharton's Am. Crim. Law, sec. 416, and cases there cited; see also secs. 422, 423. We think the above citation from Wharton contains a correct statement of the rule, and applying it to the indictment before us, we are of opinion that the several counts were properly joined; and as they do not charge distinct offenses, but evidently relate to the same transaction, the attorney for the state ought not to have been required to elect. In the case of *Regina v. Strange*, 8 Car. & P. 172, 34 Eng. Com. L. 341, where the indictment was under the statute 7 Wm. IV., and 1 Vic., c. 85, and charged the offense in various forms, as in this case, it was held by Lord Denman, C. J., and Mr. Justice Park, that the prosecutor could not be compelled to elect on which charge he should proceed, and we entirely concur in the propriety of that decision. We have deemed it proper to express our opinion upon this question, on account of its intrinsic importance, and for the purpose of settling the practice in the state; although the alleged error is not one which can be reviewed and corrected by an appellate court. It is well settled that such motions are addressed to the discretion of the inferior court, and a writ of error will not lie from its decision thereon: *Bailey v. State*, 4 Ohio St. 440; *State v. Leonard*, 22 Miss. 449. In this case no benefit could accrue to the state even if we had power to review and reverse the decision of the circuit court; the defendant in error could not be again put upon his trial on the second, third, and fourth counts, because, having been acquitted of the assault charged in the fifth count, he has virtually been acquitted upon all.

Writ of error dismissed.

WHEN PROSECUTOR MAY BE REQUIRED TO ELECT ON WHICH OF SEVERAL COUNTS OF INDICTMENT HE WILL PROCEED. — The joinder of counts for several offenses in the same indictment is treated in the note to *Ben v. State*, 53 Am. Dec. 247-250; and it is there said that, as a matter of strict law, there is no reason why any number of counts, for any number or kind of offenses, may not be joined in the same indictment, where not otherwise provided by statute; but that the practice of uniting several counts in an indictment would obviously lead to great oppression if not controlled by a wise judicial discretion. And this discretion is universally conceded to the court before which a criminal cause is tried (see *infra*), since it is clear that "if the prosecution were permitted to heap up charges against a prisoner in the same indictment, and to try all before the same jury, it might not only overwhelm him with confusion in his defense, but break him down with a weight of

obloquy before he had had an opportunity to defend. The attention of the jury might be so distracted by the multiplicity of charges, and by an imposing array of suspicious circumstances applying to the different counts, as to convict upon all, although if the accusations were tried singly, there could be no conviction upon any": Note to *Ben v. State*; *supra*. For these reasons, therefore, the common law has vested in criminal courts a discretion to be exercised under an enlightened sense of justice and humanity, by means of which the judge, if he sees that the prisoner is likely to be embarrassed in his defense by the several counts of an indictment which charge different offenses, may either quash the indictment or compel the prosecutor to elect upon which of the different counts he will proceed.

PROSECUTOR MAY JOIN COUNTS CHARGING DIFFERENT OFFENSES WHEN NECESSARY TO MEET EVIDENCE AS IT MAY TRANSPIRE. But to arbitrarily compel an election in all instances where there are several counts of an indictment charging more than one offense would tend to cripple prosecutions and defeat the ends of justice: *State v. Gray*, 37 Mo. 464. And therefore it is a general rule that an election will not be required where the several counts of the indictment are inserted in good faith for the purpose of meeting the evidence as it may transpire, and the offenses charged, though technically "different," are not "distinct," but are of the same general nature, substantially for the same offense, and arising out of the same transaction and the same testimony, must necessarily be relied upon for a conviction: *People v. McDowell*, 30 N. W. Rep. 68 (Mich.); *Engleman v. State*, 2 Ind. 91; S. C., 52 Am. Dec. 494; *McGregor v. State*, 16 Ind. 9; *Griffith v. State*, 36 Id. 466; *State v. McPherson*, 9 Iowa, 53; *State v. House*, 55 Id. 466; *State v. Flye*, 26 Me. 312; *Pettes v. Commonwealth*, 126 Mass. 245; *State v. Daubert*, 42 Mo. 242; *State v. Turner*, 63 Id. 436; *Cundy v. State*, 8 Neb. 482; *State v. Canterbury*, 28 N. H. 195; *State v. Lincoln*, 49 Id. 464; *Kane v. People*, 8 Wend. 203; *Tag v. People*, 12 Hun, 212; *People v. White*, 55 Barb. 606; *La Beau v. People*, 33 How. Pr. 66, 69; *State v. Morrison*, 85 N. C. 561; *State v. Hazard*, 2 R. I. 474; S. C., 60 Am. Dec. 96; *Gonzales v. State*, 12 Tex. App. 664; *Dill v. State*, 1 Id. 278; *Weathersby v. State*, 1 Id. 643; *Dalton v. State*, 4 Id. 333; *Irvine v. State*, 8 Id. 46; *Masterson v. State*, 20 Id. 574; *Dowdy v. Commonwealth*, 9 Gratt. 727; S. C., 60 Am. Dec. 314; *Mabry v. Commonwealth*, 2 Va. Cas. 396; *Young v. Rex*, 3 Term Rep. 98; *Regina v. Fussell*, 3 Cox C. C. 291; *Regina v. Trueman*, 8 Car. & P. 727; *Regina v. Davis*, 3 Fost. & F. 19.

And as an indictment may contain as many counts charging the same offense as the attorney who prepares it may think necessary to insert, a good pleader will insert as many counts in an indictment as he believes are necessary to provide for every possible contingency in the evidence, and it is the common practice to do so: *Gonzales v. State*, 12 Tex. App. 663; *Dill v. State*, 1 Id. 278; *Pettes v. Commonwealth*, 126 Mass. 245; *State v. Mallon*, 75 Mo. 355; *State v. Gray*, 37 Id. 464; *State v. Porter*, 26 Id. 206; *McGregor v. State*, 16 Ind. 9; Wharton's Crim. Pl. & Pr., sec. 297. Thus as the circumstances of the following cases brought them within the general rule above stated, the several counts having been inserted in good faith to meet the evidence as it transpired, etc., it was proper that the court, exercising an enlightened and humane discretion, should refuse to compel the prosecution to elect, and should permit the indictment to stand upon all its counts; as when it contained counts charging murder and manslaughter: *People v. McDowell*, 30 N. W. Rep. 68 (Mich.); two counts, one charging that the accused did administer poison, and the other that he did cause and procure to be administered, etc.: *La Beau v. People*, 33 How. Pr. 66, 69; two counts identical in every

respect, save that one charges the murder of "George McDaniels," and the other the murder of "George McDonald": *State v. Smith*, 24 W. Va. 814; several counts varying the fatal instrument, and other incidents of a homicide: *Hunter v. State*, 40 N. J. L. 495; Wharton's Crim. Law, 8th ed., sec. 540; see also *Webster's Case*, 5 Cush. 295; S. C., 52 Am. Dec. 711, 731, 732; *State v. Johnson*, 10 La. Ann. 456; *United States v. Pirates*, 5 Wheat. 184; two counts, one for malicious shooting with intent to kill, and the other for malicious shooting with intent to wound: *Candy v. State*, 8 Neb. 482; several counts, all charging the offense of stabbing and cutting, but with a different intent in each count: *Regina v. Strange*, 8 Car. & P. 172; counts charging sedition, attending a seditious meeting, and a riot: *Regina v. Fussell*, 3 Cox C. C. 291; five counts charging arson in firing the houses of different owners, since it was shown at the opening of the evidence that the five houses were in a row, and that one fire burnt them all: *Regina v. Trueman*, 8 Car. & P. 727; several counts charging the defendant with setting fire to a building described in the various counts as in the occupation of different persons, and also with setting fire to goods in a building so described: *Regina v. Davis*, 3 Fost. & F. 19; see also *Newman v. State*, 14 Wis. 393 (but election may be compelled where distinct arsons are charged: *State v. Smalley*, 50 Vt. 736); counts charging robbery by putting in fear and by violence: *State v. Mallon*, 75 Mo. 355; two counts, the first charging the crime of burglary to have been committed in the daytime, and the second at night: *Gonzales v. State*, 12 Tex. App. 657; counts charging burglary and larceny: *State v. Turner*, 63 Mo. 436; or burglary, grand larceny, and receiving stolen goods: *People v. Baker*, 3 Hill, 159; counts charging the forging of a bill of exchange, and of the acceptance and indorsement thereof: *Rez v. Young*, Peake's Add. Cas. 228; counts charging larceny and receiving stolen goods, or entering a house with intent to steal, and varying the ownership of the property in the different counts: *Rez v. Beeton*, 2 Car. & K. 961; *Beasley v. People*, 89 Ill. 571; *State v. Nelson*, 29 Me. 329; *Commonwealth v. Dobbin*, 2 Pars. Cas. 380; *People v. Thompson*, 28 Cal. 214; counts charging larceny and receiving stolen goods: *State v. Hogan*, R. M. Charl. 474; *Kerfer v. State*, 4 Ind. 246; *State v. Dabbert*, 42 Mo. 242; *State v. Morrison*, 85 N. C. 561; *State v. Hazard*, 2 R. I. 474; S. C., 60 Am. Dec. 96; *Hampton v. State*, 8 Humph. 69; S. C., 47 Am. Dec. 599; *Dowdy v. Commonwealth*, 9 Gratt. 727; S. C., 60 Am. Dec. 314; but see *State v. Jones*, 82 N. C. 685; counts charging larceny or grand larceny and embezzlement: *Griffith v. State*, 36 Ind. 406; *State v. Porter*, 26 Mo. 201; counts charging embezzlement and obtaining money by false pretenses: *State v. Lincoln*, 49 N. H. 464; counts charging the obtaining of money under false pretenses, and obtaining the signature to a note by false pretenses: *State v. House*, 55 Iowa, 466; counts charging the defendant as principal in the first and second degree: *Regina v. Gray*, 7 Car. & P. 164; *State v. Testerman*, 68 Mo. 406; counts charging the defendant as accessory before and after the fact: *Regina v. Blackson*, 8 Car. & P. 43; *Tompkins v. State*, 17 Ga. 356; and a count for maintaining a house of ill-fame under the statute, and a count for maintaining a disorderly house at common law, may be joined in one indictment, and if both counts refer to the same transaction, the defendant is not entitled to compel the prosecution to elect: *Commonwealth v. Ismahl*, 134 Mass. 201.

But though in cases such as the above, which fall under the general rule above stated, election is not usually required, yet it must be remembered that this matter is one within the wise and humane discretion of the court (see *infra*), that the rule is merely a general one, commonly acted upon by judges, but not, however, binding upon them; and therefore, even in such

cases, should the court deem it to be just and right, it seems that it may compel the prosecution to elect: See *McGregor v. State*, 16 Ind. 9; *State v. Daubert*, 42 Mo. 242; *Pettes v. Commonwealth*, 126 Mass. 245. But where the counts vary the charge merely in form, there will of course be no election: *Stewart v. State*, 58 Ga. 577; see *Engleman v. State*, 2 Ind. 91; S. C., 52 Am. Dec. 494.

WHEN ELECTION IS REQUIRED. — We have seen that there is no objection in point of law to the joinder of distinct offenses growing out of different transactions in one indictment: See note to *Ben v. State*, 58 Am. Dec. 247, 248, giving instances; but if this is done, the court frequently exercises its discretion to compel the prosecution to elect, since such a joinder tends to embarrass the prisoner, and confound him in his defense; and if such is the case, the court ought to require an election: *Engleman v. State*, 2 Ind. 91; S. C., 52 Am. Dec. 494; *State v. Abrahams*, 6 Iowa, 117; S. C., 71 Am. Dec. 399; *State v. McPherson*, 9 Iowa, 53; *State v. Cazeau*, 8 La. Ann. 109; *State v. Porter*, 26 Mo. 206; *State v. Lincoln*, 49 N. H. 464; *Kane v. People*, 8 Wend. 203, 211; *Commonwealth v. Gillespie*, 7 Serg. & R. 469; S. C., 10 Am. Dec. 475; *Regina v. Heywood*, 1 Leigh & C. 451; S. C., 9 Cox C. C. 479; S. C., 10 L. T., N. S., 464. Some of the early cases would seem to confine the action of the court in this respect to cases where distinct felonies are charged: *Regina v. Heywood*, *Kane v. People*, and *Commonwealth v. Gillespie*, *supra*; but as the whole matter is discretionary (see *infra*), no reason is perceived why it may not extend to joinders of misdemeanors, or of misdemeanors and felonies, as well as to joinders of felonies; and at the present day, the distinction seems not to be generally regarded: See Wharton's Crim. Pl. & Pr., sec. 294.

In South Carolina it is held that the proper practice, where two or more distinct offenses are charged, is to require the prosecuting officer to select one of the offenses, and confine himself to it, even though no motion to that effect is made by the accused: *State v. Scott*, 15 S. C. 436; *State v. Nelson*, 14 Rich. 169, 172. And also if the counts are so numerous as to embarrass the defense, the court, in the exercise of its discretion, may compel the prosecutor to elect on which charge he will proceed: *State v. Nelson*, 29 Me. 329; and if by reason of the nature of the offenses charged, or because of the mode of proof, or because of the joinder of another party in one count, there is a possibility of prejudice to the defendant at his trial, he may move that the prosecution elect: *Pettes v. Commonwealth*, 126 Mass. 242.

When two or more distinct offenses occurring at different times are joined in one indictment, it is proper to compel the prosecutor to elect upon which count he will proceed: *Young v. King*, 3 Term Rep. 106; *Regina v. Barry*, 4 Fost. & F. 389. Thus when the prisoner fired at a person, and fifteen minutes afterwards, after he had gone to another place, fired at him again, there were two offenses, and the state, it was held, should be put to an election: *Williams v. State*, 77 Ala. 53. But where the prisoner fired at another's mules, and three minutes afterwards fired again, this was one offense only: *Busty v. State*, 77 Id. 66. But where an indictment for incest contained a count charging the crime to have been committed April 1, 1884, and another count charging it to have been committed April 1, 1882, and on divers other days between the two dates, the prosecution, it was held, should be compelled to elect: *State v. Lawrence*, 19 Neb. 307. And so where several distinct and separate arsons were charged: *State v. Smally*, 50 Vt. 736. Where two defendants were indicted for a conspiracy and for a libel, and when the prosecution closed its case there was evidence against both as to the conspiracy,

but no evidence against one of them as to the libel, the judge considered that it was fairer that the prosecution should elect upon which charge he would proceed, and he accordingly did so: *Regina v. Murphy*, 8 Car. & P. 297. And so where the defendants were jointly indicted for rape, and it appeared that one act was committed by one defendant in the absence of the other, and that another act was committed subsequently in another place by the other defendant, without assistance, there were here two distinct offenses, and the prosecution was properly required to elect as to the one on which it would proceed: *State v. Brown*, 58 Iowa, 298. In view of the rule that a party indicted as a principal cannot be convicted as an accomplice, and *vice versa*, as well as on account of the difference in the rules of evidence applicable to such diverse prosecutions, the motion to compel an election in such case should be sustained: *Simms v. State*, 10 Tex. App. 131; *Regina v. Brannon*, 14 Cox C. C. 394. The offenses of exhibiting a gambling device, and of knowingly permitting it to be exhibited in a house owned or occupied by the accused, are separate offenses under the Arkansas statute; and if charged in one indictment, the state may be required to elect: *State v. Morris*, 45 Ark. 62. Where a defendant is charged with larceny in four indictments, the indictments may be treated as one indictment with several counts, and the prosecution may be compelled to elect: *State v. McNeill*, 93 N. C. 552. Where an indictment in its first count charged the forgery of a certain instrument set out in full, and in its second count the uttering of "said instrument," and the state elected to stand on the second count alone, it was held that the first count not being stricken out, the incompleteness of the second could be supplied by reference to the first: *Boies v. State*, 13 Tex. App. 650.

However, as in the cases where the court refuses to compel an election, so in these cases the whole matter is one of discretion, for though in point of law various distinct offenses may be joined in one indictment, and this furnishes no ground of demurrer or motion in arrest of judgment, note to *Ben v. State*, 58 Am. Dec. 247, *State v. Smalley*, 50 Vt. 736, such joinder is subject to the power of the court to quash the indictment or compel an election; and therefore it would seem that the court may require the trial of the whole indictment to the same jury; and may in the interests of justice, even though the indictment charge distinct offenses, refuse to compel an election: *Commonwealth v. Hills*, 10 Cush. 530; *Petties v. Commonwealth*, 126 Mass. 545; *Teat v. State*, 53 Miss. 439; *Wright v. State*, 4 Humph. 194; *Cash v. State*, 10 Id. 111, 113; and cases cited in the note to *Ben v. State*, 58 Am. Dec. 248; see also *infra*.

COMPELLING ELECTION IS DISCRETIONARY. When several offenses are joined in one indictment, a motion on the part of the prisoner to compel the prosecution to elect on which of the counts he will proceed is addressed to the discretion of the court, to be exercised under an enlightened sense of justice and humanity: *McGregor v. State*, 16 Ind. 9; *Griffith v. State*, 36 Id. 406; *Beaty v. State*, 82 Id. 228; *Dantz v. State*, 87 Id. 398; *Baker v. State*, 4 Ark. 56; *State v. Cazeau*, 8 La. Ann. 109; *State v. Flye*, 26 Me. 312; *State v. Nelson*, 29 Id. 329; *Commonwealth v. Hills*, 10 Cush. 530; *Petties v. Commonwealth*, 126 Mass. 545; *Sarah v. State*, 28 Miss. 267; S. C., 61 Am. Dec. 544; *Teat v. State*, 53 Miss. 439; *State v. Jackson*, 17 Mo. 544; S. C., 59 Am. Dec. 281; *State v. Leonard*, 22 Mo. 449; *State v. Porter*, 26 Id. 206; *State v. Gray*, 37 Id. 463; *State v. Daubert*, 42 Id. 242; *State v. Pitts*, 58 Id. 566; *State v. Lincoln*, 48 N. H. 464; *People v. Baker*, 3 Hill, 159; *La Beau v. People*, 33 How. Pr. 66, 69; *People v. White*, 55 Barb. 606; *Tay v. People*, 12 Hun, 212;

Commonwealth v. Birdsall, 69 Pa. St. 482; *State v. Hazard*, 2 R. I. 474; S. C., 60 Am. Dec. 96; *Wright v. State*, 4 Humph. 194; *Hampton v. State*, 8 Id. 69; S. C., 47 Am. Dec. 599; *Dowdy v. Commonwealth*, 9 Gratt. 727; S. C., 60 Am. Dec. 314; *United States v. Bennett*, 17 Blatchf. 357, 362; *Regina v. Fussell*, 3 Cox C. C. 291; *Regina v. Trueman*, 8 Car. & P. 727; *Young v. King*, 3 Term Rep. 106; 1 Starkie's C. P. 36; Wharton's Cr. Pl. & Pr., sec. 295; 1 Bishop's Cr. P., sec. 449; and cases cited in the note to *Ben v. State*, 58 Am. Dec. 249. And ordinarily the action of the court upon the motion, whether in granting or denying it, is not open to review in the appellate court, and is not assignable as error: Note to *Ben v. State*, *supra*; *Weinsorpflin v. State*, 7 Blackf. 186; *Griffith v. State*, 36 Ind. 406; *Mershon v. State*, 51 Id. 14; *Beatty v. State*, 82 Id. 228; *State v. Porter*, 26 Mo. 201; *People v. Baker*, 3 Hill, 159; *People v. White*, 55 Barb. 606; *La Beau v. People*, 33 How. Pr. 66, 69; *Wright v. State*, 4 Humph. 194; *Hampton v. State*, 8 Id. 69; S. C., 47 Am. Dec. 599; *Cash v. State*, 10 Humph. 111, 113. But it is to the sound discretion of the trial court that this matter is submitted; and if it is manifested that the discretion has been abused, to the obvious and palpable detriment of the accused, this may justify the granting of a new trial: *State v. Gray*, 37 Mo. 464; *State v. Daubert*, 42 Id. 242; *Womack v. State*, 7 Cold. 508; *State v. Nelson*, 14 Rich. 169, 172; *Fisher v. State*, 33 Tex. 792; *Simms v. State*, 10 Tex. App. 131. But a refusal to compel an election between two or more transactions referable to a count on which there is an acquittal presents no error injurious to the defendant: *Clark v. State*, 47 N. J. L. 556.

In South Carolina it is held that where distinct felonies are charged, it is proper to require an election, though no motion to this effect be made by the prisoner's counsel. And in a case where the indictment charged felony and misdemeanor, and a general verdict was rendered, the report leaving it doubtful whether the jury had been fully instructed as to the effect of such a finding, and that they might convict on any one of the counts, a new trial was ordered: *State v. Nelson*, 14 Rich. 169, 172; see *State v. Scott*, 15 S. C. 436.

And in Texas, it was said that it was error to compel an election on an indictment for burglary containing two counts, one charging the offense to have been committed in the daytime, and the second at night: *Gonzales v. State*, 12 Tex. App. 657. But even conceding that this was a gross abuse of discretion, if the counts are for substantially the same offense, the accused will have his plea of former jeopardy, and it would be futile to grant a new trial at the behest of the prosecution: See the principal case.

AT WHAT POINT IN PROGRESS OF CASE ELECTION MAY BE REQUIRED. — If the indictment shows upon its face that an election is proper, the motion may be made when it is read: *Gilbert v. State*, 65 Ga. 449; *Tay v. People*, 12 Hun, 212. Otherwise the motion may be made as soon as the prosecuting officer has introduced sufficient evidence to demonstrate the advisability and propriety of granting the motion; but as a general rule, the motion should be made and decided before the defendant introduces any evidence: *Lunn v. State*, 44 Tex. 85; *Fisher v. State*, 33 Id. 792; *Simms v. State*, 10 Tex. App. 131; *Gilbert v. State*, 65 Ga. 449; *Regina v. Murphy*, 8 Car. & P. 297. Yet where the repugnancy does not appear until all the evidence is in, the motion to elect has been held to be in time if made before verdict: *Womack v. State*, 7 Cold. 508; *Blam v. State*, 26 Ala. 48; *Johnson v. State*, 29 Id. 62; *Wash v. State*, 14 Smedes & M. 120; *State v. Lincoln*, 49 N. H. 464. But though the prosecution may elect at any time before verdict, it should ordinarily be done before summing up: *Woodford v. People*, 62 N. Y. 117. And after a general verdict in case of a

misjoinder, the prosecutor cannot elect a particular count, but must enter a *not. pros.* as to the counts on which judgment is not sought: *State v. Reel*, 80 N. C. 442; *State v. Crosby*, 4 La. Ann. 434.

If defendant has pleaded not guilty, he should be allowed to withdraw his plea in order to demand election; but there is no incongruity in permitting him to require such election while his plea of not guilty is pending: *State v. Abrahams*, 6 Iowa, 117; S. C., 71 Am. Dec. 399; *State v. Hale*, 44 Iowa, 96.

HIGGINS v. CARLTON.

[28 MARYLAND, 115.]

FACT THAT ILLEGAL TESTIMONY HAS BEEN PERMITTED TO GO TO JURY without objection is not ground for allowing other testimony, inadmissible under the rules of evidence, to be given when objection thereto is made.

CONTENTS OF MEMORANDUM WHICH IS IN COURT CANNOT BE PROVED BY PAROL for any purpose. What is in writing must be proved by the writing itself.

PARTY ASKING WITNESS QUESTION CANNOT OBJECT TO HIS ANSWER if it be responsive to the question.

RULINGS OF COURT BELOW, THOUGH ERRONEOUS, ARE NOT GROUND FOR REVERSAL of a judgment, where it appears from the record that the appellant has not been injured by them. And for the purpose of determining whether or not he has been injured thereby, it is proper to look to the whole record, and not to that part only which precedes and includes the particular exception under consideration.

OPINION OF WITNESS AS TO "PHYSICAL CAPACITY" OF TESTATOR to hold conversations, testified to by another witness as having taken place at a time when the witness whose opinion is asked was not present, is not competent evidence.

TO LAY PROPER FOUNDATION TO DISCREDIT WITNESS by proof of anything he may have said, it is not sufficient to merely direct his attention to dates, names, and other attendant circumstances, but he must also be asked whether or not he has said or declared that which is intended to be proved.

CAVEATERS ARE ENTITLED TO OFFER REBUTTING EVIDENCE ONLY, after the caveatees have closed their case, and it is not error for the court to then refuse to admit testimony which was properly admissible upon the examination in chief of the witness.

COURT HAS RIGHT OF ITS OWN MOTION TO MODIFY PRAYER. It may reject all the prayers asked, and instruct the jury in its own words, or it may grant the prayers with such explanations or qualifications as may be necessary to a proper understanding of the case.

TERM "CREDIBLE WITNESS," AS APPLIED TO ATTESTING WITNESS TO WILL, means a witness who was competent at the time of the attestation.

FACT THAT QUESTION OF LAW WAS SUBMITTED TO JURY IS NOT GROUND FOR REVERSAL, unless objection is made at the trial. And this objection must appear affirmatively upon the record, and is not to be left as a matter of inference.

LAW OF MARYLAND DOES NOT REQUIRE THAT TESTATOR SHOULD ASK SUBSCRIBING WITNESSES to his will to attest it. His assent either express or implied is sufficient, provided the act be done with his knowledge, and not in a clandestine or fraudulent way.

MAXIM, NON QUOD DICTUM, SED QUOD FACTUM EST, INSPICITUR, holds good in the execution of wills as well as of deeds.

EVERY PERSON IS PRESUMED TO BE OF SOUND MIND AND MEMORY, unless the contrary is proved. The burden of proof is therefore upon the party who asserts unsoundness of mind, unless a previous state of insanity is proved, in which case the burden is shifted to him who claims under the will.

AFTER PROBATE OF WILL, SANITY OF TESTATOR IS ALWAYS PRESUMED in favor of the will, and insanity must be proved by him that alleges it.

PROBATE OF WILL MEANS PROOF OF ITS FORMAL EXECUTION.

WILL IS DULY EXECUTED BY TESTATOR where he affixes his mark thereto by the assistance of one of the subscribing witnesses by the request or with the assent of the testator, and on being asked if he acknowledges the same to be his mark, or words to that effect, assents, and being asked if he wishes the witnesses present to attest it as his last will and testament, assents, and the witnesses attest the same by subscribing their names thereto, by his request, in his presence, and in the presence of each other, provided such testator was at the time of sound and disposing mind, and mentally capable of executing a valid deed or contract.

PERSON OF SOUND MIND MAY DISPOSE OF HIS PROPERTY IN ANY MANNER he pleases, consistent with the policy of the law, and it is not a valid objection to a will that the testator gave his property to his wife or to strangers to his blood, provided he was mentally competent and free from undue influence at the time.

IT IS NOT SUFFICIENT TO AVOID WILL THAT ITS DISPOSITIONS ARE IMPRUDENT and not to be accounted for.

INFLUENCE SUCH AS TO VITIATE WILL MUST BE UNLAWFUL, and must be exerted to such a degree as to amount to force or coercion, destroying free agency. It must be more than the influence of affection or attachment, or the mere desire of gratifying the wishes of another, and there must be satisfactory proof that the will was obtained by this coercion.

CAPACITY TO MAKE WILL IS NOT AFFECTED BY AGE, SICKNESS, extreme distress, or debility of body, if sufficient intelligence remain.

JURY HAVE NO RIGHT TO REJECT WILL because they think its provisions are unjust and injudicious, although its provisions may be considered by them in deciding the question of the testator's capacity or incapacity.

WILL MAY BE ESTABLISHED AGAINST EVIDENCE OF ONE of three subscribing witnesses thereto.

APPEAL. The seventh exception was as follows: Dr. Belt, a witness on the part of the caveators, being asked, upon cross-examination by the caveators, upon what portion of the testimony of the witness Scott he founded his opinion of Higgins's capacity, said it was from Scott's statement that Mr. Higgins had talked to the last, but was unable to repeat any conversation detailed by the witness Scott upon which he had based his opinion. The caveators, as rebutting evidence, asked Scott

the following question: Dr. Belt, in his examination, having stated that he predicated his opinion of Mr. Higgins's capacity to execute a valid deed or contract upon what he saw or knew of him, and in part upon your evidence, now state whether or not in said evidence you stated that Mr. Higgins was irrational and wandering in his conversations, or otherwise. To this question the caveatees objected, and the court sustained the objection, and refused to permit the witness to answer it; to this ruling of the court the caveators objected. The caveators' third prayer was as follows: "Unless the jury shall believe from the evidence that the signature or mark of John Higgins to said paper was attested and subscribed by three or four credible witnesses in his presence, they must find on the first issue for the caveators." This was granted, with the following modification: "And that the meaning of the language 'credible witnesses' is, that at the time of the execution of the will the subscribing witnesses were not incompetent to testify by reason of infancy, insanity, or mental imbecility, or any other cause." The fifth prayer of the caveators was as follows: "Unless the jury believe from the evidence that the said paper writing was attested by the subscribing witnesses at the request of the said John Higgins, they must find on the first issue for the caveators." This was given with the following modification: "But it is a sufficient request on the part of the testator, if the jury find from the evidence aforesaid that he sent for the witness Stephen to write his will, and after the same was read to and approved by him, he was asked by said Stephen if he wished to execute the said will at that time or next day, and replied, 'The sooner the better,' and desired them to wait for Mr. Gallant, as a witness, as he was younger than Mr. Carroll; and if the jury further find that, after the testator had made his mark in the manner stated in the evidence, he was asked by the said Stephen if he desired him, Mr. Gallant, and Mr. Scott, all of whom were then present, to attest his mark or signature to said paper, and that he said he did, or assented by a nod, and thereupon the said named parties did attest the same in his presence." The prayers of the caveatees, referred to in the opinion of the court, are as follows: 1. If the jury believe from the evidence that the said John Higgins affixed his mark to the paper writing propounded as his last will, and that in doing so he was assisted by the witness Stephen, by the request or with the assent of said Higgins, and that there-

upon the said Higgins was asked if he acknowledged the same to be his mark, or words to that effect, to which he assented, and that thereupon he was asked by the said Stephen whether he wished the witnesses Gallant, Scott, and himself to attest it as his last will and testament, or words to that effect, to which he assented, and thereupon said witnesses did attest the same by subscribing their names thereto, by his request, in his presence, and in the presence of each other, said paper writing was then delivered by said Stephen to the testator, and that the testator then handed said paper writing to his wife, and requested her to take care of it,—then the said paper writing was duly executed, provided the jury shall further find that at such execution the testator was of sound and disposing mind, and mentally capable of executing a valid deed or contract. The other prayers of the caveatees, to which exceptions were taken, are as follows: 2. That the presumption of law is in favor of the sanity of the testator, and of his capacity to make a will, and the burden of proof is on the caveators to establish a want of testamentary capacity, in order to justify the jury in setting aside the will on that ground. 4. It is not sufficient to avoid a will and testament that its dispositions are imprudent, and not to be accounted for. 6. If the jury believe from all the evidence in the cause that the only influence ever possessed or exercised by Mary Higgins, his wife, over the testator, her husband, was that of a kind and affectionate wife, gained by her virtues, affection, and kindly offices and attentions, then the existence of such an influence so possessed, acquired, and exerted is of itself no ground for setting aside the will. 7. Every person of twenty-one years of age is presumed to be of sound mind and competent to make a will, and this presumption extends throughout his life, no matter to what age he may live; the onus of establishing incapacity is on the parties who assail the will; extreme old age does not of itself disqualify a person for making a will; the law looks only to the competency of the understanding, and neither age nor sickness, nor extreme distress nor debility of body, will affect the capacity to make a will, if sufficient intelligence remain. 11. That if the jury find from the evidence in the cause that John Higgins was, at the time of executing the will referred to in this case, of sound and disposing mind, and capable of making a valid deed or contract, then he was in the possession of that description of mental capacity which is required by the testa-

mentary act of this state, and that the meaning of the words "sound and disposing mind, and capable of making a valid deed or contract," in respect to the disposition of his property by last will and testament, is, that he must have had sufficient capacity, at the time of executing the said will, to make a disposition of his estate with judgment and understanding in reference to the amount and situation of his property and the relative claims of the different persons who should have been the objects of his bounty. But the meaning of the words "judgment and understanding" is not that the jury should reject the will because they may believe that it is in its provisions unjust and injudicious, although the provisions of the will may be considered by them in deciding the question as to the capacity or incapacity of the testator. 12. That from the whole evidence in the case, it is competent for the jury to find the due execution of the will in issue and a sufficient testamentary capacity in the testator, although one of the subscribing witnesses may have testified against the due execution of the will aforesaid, and against the testamentary capacity of the testator. 13. That the influence which will avoid the will must be exerted to such a degree as to amount to force or coercion, destroying free agency; it must not be the influence of affection or attachment, nor the mere desire of gratifying the wishes of another, for that would be a very strong ground in favor of a testamentary act, and there must be a satisfactory proof that the will was obtained by this coercion, or by importunities which could not be resisted, so that the motive was tantamount to force or fear. The other facts appear from the opinion.

Daniel Clarke, Thomas F. Bowie, and Thomas G. Pratt, for the appellants.

James Revell and Robert J. Brent, for the appellees.

By Court, BRENT, J. This case arises upon a caveat, filed in the orphans' court of Prince George's County, to the will of John Higgins. Issues involving execution, testamentary capacity, fraud, and undue influence were sent up for trial to the circuit court for that county. Upon application by the caveatees, the case was afterwards removed to the circuit court for Anne Arundel County, and it now comes before us upon the several exceptions taken by the caveators at the trial to the rulings of that court.

The first exception alleges error in the court in refusing to

allow a witness upon cross-examination to testify in regard to the difference between the contents of a memorandum and the will in controversy. It is necessary in deciding upon the admissibility of this evidence to refer to a part of the testimony previously given by this witness. He was the attorney who drew the will; and upon his examination in chief had stated that it "was drawn from a memorandum placed in his hands by Mrs. Higgins, to whom, at the suggestion of Mr. Higgins, he applied for it." Upon cross-examination, the caveators asked him to produce this memorandum. This he did, and handed it over to them. Upon further cross-examination, he testified to certain discrepancies between it and the will, and to the fact "that in drawing the will he did not pursue the memorandum exclusively." He was then asked "if the memorandum differed from the will in any other respects." Upon objection being made by the counsel for the caveatees, the court refused to permit the question to be answered. It has been argued that the evidence was admissible upon three grounds: to test the accuracy of the recollection of the witness, to contradict him, and to prove the genuineness of the memorandum. The last ground is wholly untenable, and is too clearly in violation of the rules of evidence to be seriously entertained.

As a general proposition, a party has the undoubted right, upon cross-examination, to test the accuracy of the recollection of a witness, and to show that his statements are contradictory. But this cannot be done in violation of other equally well-settled rules. The memorandum referred to had not been given in evidence to the jury, and it is apparent that the witness could not have answered the question put to him by the caveators, without proving by parol a part, if not all, of its contents. It is no reason in favor of the admissibility of this evidence that the witness had been permitted to speak, without objection, of some of the differences between this memorandum and the will. The fact that illegal testimony has been permitted to go to the jury without objection cannot be urged as a ground for allowing other testimony, inadmissible under the rules of evidence, to be given when objection is made. This memorandum being in court, its contents could not be proved by parol for any purpose. What is in writing must be proved by the writing itself. In *Queen's Case*, 2 Brod. & B. 288, S. C., 6 Eng. Com. L. 115, the following question was submitted to the judges: "Whether, when a witness is cross-

examined, and upon the production of a letter to the witness under cross-examination, the witness admits that he wrote that letter, the witness can be examined in the court below, whether he did or did not in such letter make statements, such as the counsel shall, by questions addressed to the witness, inquire are or are not made therein." They unanimously determined that the evidence was inadmissible. Abbott, C. J., in delivering their opinion, remarks: "The judges do not conceive that they are presuming to offer any new rule of evidence, now for the first time introduced by them; but that they found their opinion upon what, in their judgment, is a rule of evidence as old as any part of the common law of England, namely, that the contents of a written instrument, if it be in existence, are to be proved by that instrument itself, and not by parol evidence." The offer in this case is clearly within the prohibition of the rule, for the question could not have been answered without proving by parol the contents of the memorandum.

The case of *Burckmyer v. Whiteford*, 6 Gill, 13, if any authority is needed, disposes of the second exception. The witness was asked why he made in the will the change from the memorandum, in reference to the devise of the lands to Mrs. Ferrall. His reasons for doing so are certainly responsive to the question. Upon his proceeding, however, to give them, the very party asking the question objected. It is now argued that they were inadmissible, because the necessary inference of their being irrelevant was raised by the witness stating, "he did not consult Higgins, or talk with him upon the subject." The reasons given by the witness are not in the record, nor is it necessary that we should know what they were in determining the point as it is presented. Looking, however, to the preceding testimony, the inference is in favor of their relevancy, or at least it cannot be assumed they were necessarily irrelevant. A third party, at the request of Higgins, may have directed the alteration to be made. That it was done by his authority, and for reasons satisfactory to him, cannot be doubted. The devise, as it is found in the will, was approved by Higgins, for this witness states, that after preparing the will, "he read it to the testator *verbatim et literatim*, who ratified it." We do not, therefore, perceive that there was any error or injustice done to the appellants in permitting the witness to answer a question put to him by themselves.

It has been repeatedly settled by the decisions of this court

that a judgment will not be reversed where it appears from the record the appellants have not been injured by the rulings of the court below, although such rulings may be erroneous. For this purpose, it is proper to look to the whole record, and not, as was argued in this case, to that part only of the record which precedes and includes the particular exception under consideration. We think it unnecessary, and do not mean to express any opinion upon the question presented by the third exception. The error there complained of, even conceding the ruling of the court to be wrong, does no injury to the appellants. The testimony sought to be elicited by them is afterwards given by the witness Scott, and is found in the evidence contained in the seventh exception. He there assigns his reasons for objecting to sign the will in controversy as one of the attesting witnesses, and the appellants have had the benefit or those reasons before the jury.

The fourth exception is taken to the refusal of the court below to allow a witness to give in evidence his opinion of the "physical capacity" of the testator to hold conversations testified to by another witness, the witness under examination not being present. It is properly said in *Phillips v. Kingfield*, 19 Me. 379 [36 Am. Dec. 760], that "the opinions of a witness are not legal testimony except in special cases; such, for example, as experts in some profession or art, those of the witnesses to a will, and in our practice, opinions on the value of property. In other cases, the witness is not to substitute his opinion for that of the jury; nor are they to rely upon any such opinion instead of exercising their own judgment, taking into consideration the whole testimony." The courts of Maryland have gone a step further, and allowed witnesses to express their opinion upon the mental condition of a testator whose will is controverted, unless it be a mere naked opinion unaccompanied by the facts and circumstances upon which it is founded. It is not claimed that the witness in this case is an expert, nor is he brought within any of the other exceptions to the rules. We have failed to find a single authority in which testimony of this character has been admitted. The rule has already been sufficiently relaxed, and we think the doctrine of admitting the opinions of witnesses has been carried quite as far as is consistent with a proper administration of the law.

The fifth exception having been abandoned by the appellants, the next question arises upon the sixth exception. The

witness was asked, for the purpose of laying a foundation to contradict her, "if she had ever had a conversation with the witness Scott in reference to the memorandum from which the will was drawn." Having answered in the negative, Scott was afterwards called, and the question set out in this exception put to him by the caveators. The court, upon objection made, refused to permit him to answer it, and in this refusal the appellants allege there is error. In *Whiteford v. Burckmyer*, 1 Gill, 139 [39 Am. Dec. 640], the rule is laid down that "the witness whom it is intended to impeach should have a full and fair opportunity to recollect by calling his attention to dates, names, and other attendant circumstances connected with the matter about which he is charged to have made different statements." In the present case, the memorandum spoken of had been written nine months before the date of the will in controversy, and to have given the witness "a full and fair opportunity to recollect," her attention should have been called to something more than the name of the party. The question embraced a long period of time, and justice to the witness required that her attention should have been directed, at least with a reasonable degree of certainty, to dates and other attendant circumstances. The question put to her was of the most general character, and for the purpose for which it was asked is liable to another fatal objection. She was not asked whether she had made certain statements about this memorandum to the witness Scott, but simply if she had ever conversed with him about it. Where the object is to lay a proper foundation to discredit a witness by proof of anything he may have said, it is not alone sufficient to direct "his attention to dates, names, and other attendant circumstances"; he must also be asked "whether or no he has said or declared that which is intended to be proved": *Queen's Case*, 2 Brod. & B. 313. In this view of the law, we think a proper foundation was not laid for the introduction of the testimony offered, and that the court was right in rejecting it.

The seventh exception also presents a matter of evidence. The question asked by the caveators was irregular. The caveatees had closed their case, and the caveators at that stage of the trial were entitled strictly to offer rebutting evidence only. The evidence offered was not of that character. It certainly could not have had the effect to contradict the witness whose testimony it was designed to impeach. He had made no statement that Scott had testified to rational or irra-

tional conversations on the part of the testator. If the testimony had already been given, it was only asking the witness to repeat what he had before said; and if it had not, it was testimony properly admissible upon his examination in chief. In either event the court had the right to reject it.

We do not concur in the views urged by the counsel for the appellants in reference to the right and power of the court of its own motion to modify a prayer. To deny this right would be undertaking to change a practice long established in this state, having its foundation in reason, and well calculated to advance a proper administration of justice. The right to modify a prayer, and error in the modification made, present totally different questions. In the cases referred to by the appellants' counsel (*Hall v. Hall*, 6 Gill & J. 399, *Harrison v. Mayor*, 1 Gill, 280), the prayers granted by the court below were not reversed because the court had no right to modify them, but because as granted they were erroneous. In *Keener v. Harrod*, 2 Md. 74 [56 Am. Dec. 706], this question was reviewed, and we regard it as finally settled by that case. The court say: "However, as a general rule, it may be proper to grant or refuse prayers in the terms in which they are presented; the court may reject them all, and instruct the jury in their own words, or grant the prayers with such explanations or qualifications as may be necessary to a proper understanding of the case."

The next question to be considered is, Were the modifications of the caveators' third and fifth prayers correct? or in other words, did the prayers as granted truly state the law of the case? The term "credible witnesses," found in the third prayer, is now settled beyond dispute, as conceded in the appellants' brief to mean "competent witnesses at the time of attestation": 2 Greenl. Ev., sec. 691; *Shaffer v. Corbett*, 3 Har. & McH. 513. In giving therefore to the word "credible," in the connection in which it is used in the prayer, its technical and legal signification, the court correctly stated the law, and gave to the jury such explanation of its meaning as was doubtless "necessary to a proper understanding of the case." The restrictions in the prayer as modified, upon the competency of attesting witnesses, "by reason of infancy, insanity, or mental imbecility, or any other cause," even if erroneous, could not have resulted in injury to the appellants, for the restrictions apply to the appellees, and not to them. The argument that this prayer submits to the jury questions

proper only for the court is fully met by the act of 1862, chapter 154. This law provides that an instruction shall not be reversed "because of a question of law having been thereby submitted to the jury, unless it appears from the record that such objection was taken at the trial." This objection must appear affirmatively upon the record, and is not to be left as a matter of inference. This record is silent as to any such objection "taken at the trial," and it cannot, therefore, be now urged before this court: *Lane v. Lantz*, 27 Md. 211; *Morrison v. Hammond*, 27 Id. 609. The facts stated by the court below, in the modification of the fifth prayer, are sufficient in law, if found by the jury, to constitute a legal request by the testator for the subscribing witnesses to attest his will. The testamentary law of this state does not require that a testator should ask them to attest it. His assent, either express or implied, is sufficient, provided "the act be done with his knowledge, and not in a clandestine and fraudulent way." Section 301, article 93, of the Code of Public General Laws, referring to the attestation of wills, is in these words: "And shall be attested and subscribed in the presence of the said deviser by three or four credible witnesses." If the prayer had been granted by the court without the qualification annexed, the instruction might have misled the jury in supposing that the law required the testator to ask the witnesses to sign his will,—the word "request" being ordinarily understood in that sense. The court was therefore right in stating facts in its modification of the prayer, which, if found by the jury, were sufficient to establish in law the attestation of this will: *Johnson v. Clendenin*, 5 Har. & J. 480; *Cramer v. Crumbaugh*, 3 Md. 501; *Welty v. Welty*, 8 Id. 23. In *White v. British Museum*, 6 Bing. 310, Tindal, C. J., says, that "in the execution of wills as well as of deeds the maxim will hold good, *Non quod dictum sed, quod factum est, inspicitur*."

The question as to the *onus probandi*, where the issue is testamentary capacity, has been a great deal discussed by both judges and text-writers, and has furnished an occasion for the display of much learning and ingenuity. The numerous decisions upon the subject in this country are by no means uniform, and many of them are in direct conflict, so that any attempt to reconcile them would be hopeless. They all, however, agree upon the general proposition that sanity is presumed by law. But in some of the states it is held that this general presumption does not apply to last wills and testaments,—

they forming an exception to the rule,—and that therefore a party propounding a will must not only prove execution, but must also offer positive proof of capacity: *Gerrish v. Nason*, 22 Me. 438 [39 Am. Dec. 589]; *Wright v. Keith*, 24 Id. 162; *Crowninshield v. Crowninshield*, 2 Gray, 524. A different rule, however, is recognized in most of the American courts, and it is sustained by reason and the weight of authority: *Jackson v. Van Dusen*, 5 Johns. 144 [4 Am. Dec. 330]; *Sloan v. Maxwell*, 3 N. J. Eq. 580; *Brooks v. Barrett*, 7 Pick. 94; *Pearpoint v. Graham*, 4 Wash. C. C. 269; 1 Redfield on Wills, c. 3, sec. iv., sec. 5. If the presumption of law is in favor of sanity, we can discover no satisfactory reason why it should not be applied to wills as well as to any other instrument of writing. The argument drawn from the fact that the statute requires the testator to be “of sound and disposing mind,” if a good one, would apply with equal force to the other requirements of the statute. The testator, in terms as affirmative as those in reference to capacity, is required to be of a certain age fixed by the statute. Yet no court has ever required a party propounding a will to prove the age of the testator, until the question was raised upon proof by the contestants. Why the one should be permitted to rest undisturbed upon the doctrine of presumption, and not the other, to say the least, does not seem to be in accordance with sound reason. In Swinburne on Wills, p. 44, pt. 2, sec. 3, it is said: “Every person is presumed to be of perfect mind and memory, unless the contrary is proved. If it be asked wherefore, then, is that usual clause (of perfect mind and memory) so duly observed in every testament, if he that doth prefer the will be not charged with the proof thereof? It may be answered that that which is notorious is to be alleged, not proved. And so this being accounted notorious (because where the contrary appeareth not, the law presumeth it), it need not be proved.” This doctrine is recognized to its full extent, and affirmed in the cases last above referred to; and the rule is distinctly laid down as a logical conclusion from the presumption in favor of sanity, that “the burden of proof lies upon the person who asserts unsoundness of mind; unless a previous state of insanity has been established, in which case the burden is shifted to him who claims under the will.” In referring to the doctrine laid down in 5 N. J. L. 454, that “after probate the sanity of the testator was always to be presumed in favor of the will, the insanity to be proved by him that alleges it,” the court say in

Sloan v. Maxwell, 3 N. J. Eq. 580, "by the words 'after probate,' we are to understand after proof of formal execution." These authorities rest upon sound reasoning. They also harmonize with the ancient rule of presumption in favor of sanity, and thereby escape the fallacy "of requiring a party to give positive proof of the existence of a fact, which the law presumes, in the absence of all proof."

The practice in this state has been in conformity to these views of the law. The caveators have always taken the position of plaintiffs, and have had the right to open and close the case. *Brooke v. Townshend*, 7 Gill, 24, is conclusive upon this question of practice. In the court below, the caveatees claimed the right of opening and concluding the argument before the jury. The question coming before this court upon appeal, Mr. Justice Martin, in delivering the opinion, says: "The issues in dispute and transmitted to the county court for the determination of a jury are predicated on an affirmation of facts, introduced for the purpose of impeaching the will by the caveators on the one side, and a negation of those facts by the caveatee in his answer. And it appears to us to be perfectly clear that in a case thus situated, the caveators are to be regarded as the assailants of the will, as the actors who originated this proceeding, and who were therefore entitled to be placed upon the record in the attitude of plaintiffs." This case also decides that, the *factum* of the will being conceded by the pleadings, the will must be placed by the caveators in evidence before the jury. The court refrained from expressing any opinion upon the "presumption of its validity," as they considered the question a mere abstract one, in the form in which it was presented by the exception. But the reasoning of the judge and the rulings upon the first two exceptions can lead to no other conclusion than one in favor of the presumption of mental capacity, after the *factum* or execution of a will is admitted or proved, if put in issue by the pleadings. That the law may be consistent in all its parts, the true doctrine must be, that whenever satisfactory proof establishes the doing of an act, especially if it conform to the formalities required by law, it must be considered, in the absence of opposing proof, as done by a reasonable and sane man. The very general language used in *Cramer v. Crumbaugh*, 3 Md. 501, cannot be taken to control and alter this principle. It is true that it is said in that case, upon the authority of Mr. Baron Parke, *Barry v. Buntlin*, 1 Curt.

Ecc. 637, S. C., 6 Eng. Ecc. 417, that the party propounding a will has the *onus* imposed on him, and he must discharge it "by proof of capacity, and the fact of execution." But the *quo modo* of proof must be in harmony with other recognized rules and principles. If capacity be established by evidence of a fact from which it is to be presumed, "proof of capacity" has in reality been given; and the *onus* cast upon the party propounding a will is discharged by proof of execution, because, that being proved, the presumption of capacity follows. Believing, after a very careful examination, that we are correct in our view of the law upon this question, we are of opinion that there was no error in rejecting the eleventh prayer of the caveators, and in granting the second prayer of the caveatees.

The remaining questions arising upon the various prayers of the caveatees which have been excepted to are readily disposed of by reference to adjudicated cases. The first prayer is fully sustained by the case of *Mason v. Harrison*, 5 Har. & J. 480, and conforms to the views already expressed upon the modification of the caveators' fifth prayer. The fourth, sixth, seventh, eleventh, twelfth, and thirteenth prayers, as applicable to the evidence in the record of this case, contain familiar principles of law, so firmly established by numerous and uniform decisions that it is now too late to call them into question: *Williams v. Goude*, 1 Hagg. Ecc. 577; *Miller v. Miller*, 3 Serg. & R. 269 [8 Am. Dec. 651]; *Browne v. Molliston*, 3 Whart. 137; *Gardner v. Gardner*, 22 Wend. 540 [34 Am. Dec. 340]; *Lowe v. Williamson*, 3 N. J. Eq. 88; *Van Alst v. Hunter*, 5 Johns. Ch. 159; *Davis v. Calvert*, 5 Gill & J. 301 [25 Am. Dec. 282]; *Cramer v. Crumbaugh*, 3 Md. 500; *Calvin v. Warford*, 20 Id. 387; *Lowe v. Joliffe*, 1 W. Black. 365; *King v. Nveys*, 1 Id. 416; *Mackenzie v. Handasyde*, 2 Hagg. Ecc. 211; *Le Breton v. Fletcher*, 2 Id. 558.

Rulings of the court below affirmed.

ATTESTATION OF WILL, WHAT IS SUFFICIENT, AND WHAT NOT: See *Chase v. Kittredge*, 87 Am. Dec. 687, note 699, where other cases are collected. In Maryland, it is not necessary that the testator should ask the witnesses to sign and attest his will; his assent, express or implied, is sufficient: *Etchison v. Etchison*, 53 Md. 357, citing the principal case.

OBJECTION NOT MADE IN LOWER COURT CANNOT BE CONSIDERED ON APPEAL: *Crosen v. White*, 87 Am. Dec. 420, note 422, where other cases are collected.

WITNESS CANNOT BE ASKED HIS OPINION AS TO CAPACITY OF TESTATOR: See *Rumyan v. Price*, 86 Am. Dec. 459, note 469, where other cases are col-

lected; *Farrell v. Brennan*, 82 Id. 137, note 139, where cases relating to the admissibility of the opinions of witnesses concerning the capacity of a testator are collected. In *Hayes v. Wells*, 34 Md. 518, it was said, citing the principal case, that the doctrine of admitting the opinions of witnesses has been carried quite as far as is consistent with a proper administration of the law.

PROPER FOUNDATION MUST BE LAID BEFORE INTRODUCING EVIDENCE OF CONTRADICTIONARY STATEMENTS: See *Ayres v. Duprey*, 86 Am. Dec. 657, note 668, where other cases are collected; *Remyan v. Price*, 86 Id. 459, note 470.

PRESUMPTION IS IN FAVOR OF SANITY, AND PARTY ALLEGING INSANITY IS BOUND TO PROVE IT: See *Hovey v. Chase*, 83 Am. Dec. 514, note 523. Sanity and mental capacity of a testator are presumed, and the burden of proof rests on those alleging the contrary: *Brown v. Ward*, 53 Md. 387, 395, citing the principal case.

AFTER WILL HAS BEEN ADMITTED TO PROBATE, ONUS IS UPON PARTY ATTACKING IT: See *Farrell v. Brennan*, 82 Am. Dec. 137, note 139, where other cases are collected.

RIGHT TO OPEN AND CLOSE IN PROCEEDINGS CONTESTING WILLS: See *Farrell v. Brennan*, 82 Am. Dec. 137, note 139, where other cases are collected. In *Stockdale v. Cullison*, 35 Md. 324, it was held, citing the principal case, that the right to open and close the argument of the cause belongs to the caveators.

UNDUE INFLUENCE, WHAT IS: See *Taylor v. Kelly*, 68 Am. Dec. 150, note 158, where other cases are collected.

EXTREME OLD AGE IS NOT OF ITSELF SUFFICIENT TO INCAPACITATE TESTATOR FROM MAKING WILL: See *Taylor v. Kelly*, 68 Am. Dec. 150, note 159, where other cases are collected.

TESTAMENTARY CAPACITY GENERALLY, WHAT CONSTITUTES: See *Kirkwood v. Gordon*, 62 Am. Dec. 418, note 422, where other cases are collected. A testator is to be considered of sound and disposing mind within the meaning of the statute when he freely understands the business in which he is engaged, and has sufficient capacity to make a disposition of his estate with judgment and understanding in reference to the amount and situation of his property, and the relative claims of different persons who are or should be the objects of his bounty: *McEluee v. Ferguson*, 43 Md. 485, citing the principal case.

THE PRINCIPAL CASE IS CITED in *Estep v. Morris*, 38 Md. 424, to the point that the word "credible," applied to a witness, as used in the statute, means competent to testify at the time of the attestation; and in *Hussey v. Ryan*, 64 Id. 433, to the point that the court may give instructions of its own, or explain the effect of those granted at the instance of the parties, provided they are not inconsistent therewith.

KUHN v. STANSFIELD.

[28 MARYLAND, 210.]

RECEIPT AND APPROPRIATION BY HUSBAND OF MONEY WHICH IS SEPARATE ESTATE OF HIS WIFE, with her knowledge and consent, does not establish between them the relation of debtor and creditor, unless at the time he received it he expressly agreed to repay it. And if, without agreeing to repay it, he invests it in his business, and afterwards executes a voluntary bill of sale to secure her, such conveyance will be fraudulent in law as against existing creditors, and void.

APPEAL. The opinion states the case.

James Mackubin and Robert J. Brent, for the appellant.

Henry E. Wootton and George W. Sands, for the appellee.

By Court, ROBINSON, J. In August, 1863, Michael J. Kuhn advanced to his daughter, Mary A. Somerville, by way of settlement, the sum of eight hundred dollars, as appears by the following receipt, signed by herself and husband:—

“ELLCOTT’S MILLS, August, 1863.

“We hereby acknowledge that we have received of M. J. Kuhn eight hundred dollars (\$800) as an advancement, with a view to a portion or settlement of his daughter, the undersigned Mary.

“MARY A. SOMERVILLE,

“J. H. SOMERVILLE.”

In March, 1866, Somerville, being largely indebted, executed the bill of sale set forth in the proceedings, and a few days afterwards the appellee and other creditors sued out writs of attachment against him as an absconding debtor. The validity of this bill of sale, as against the existing creditors of Somerville, is the question submitted to this court. It is conceded that a contract may be entered into by a husband for the transfer of property to his wife, for a *bona fide* consideration coming from her. The cases of *Stockett v. Holliday*, 9 Md. 480, and *Jones v. Jones*, 18 Id. 467, were decided upon this established principle of law. It is equally well settled that the relation of debtor and creditor may exist, growing out of the appropriation by the husband of the wife’s separate property; but if received and appropriated with her knowledge and acquiescence, this court has said, in *Edelen v. Edelen*, 11 Id. 420, that “in such cases there must be an agreement by the husband to repay the money so appropriated.” The case now before us must be decided by the application of this general principle of law. It is wholly immaterial whether Somerville received

the money from his wife, or Kuhn, her father, the question being whether he received and appropriated it with the wife's knowledge and acquiescence, in pursuance of an agreement to repay it. This must be determined from the face of the bill of sale and receipt, no other proof being offered in the cause. That it was received with the knowledge and acquiescence of the wife, admits of no doubt; and as to the agreement to repay it, both papers are entirely silent. It is neither expressed in the receipt, nor alleged by way of consideration in the bill of sale. The receipt is but an acknowledgment of the money advanced by the father, with a view to a settlement, and was taken for the obvious purpose of preserving the evidence of that fact. In the bill of sale Somerville admits the receipt of the money; that it was invested in his business, and expresses a desire to return it; but it is nowhere alleged that the conveyance was made in consideration of an agreement to repay it. Upon such proof as this, or in fact in the absence of all proof, this court cannot infer that such an agreement was made. The bill of sale, therefore, must be considered as a voluntary conveyance, executed by a party, in the language of Judge Martin, in *Worthington v. Shipley*, 5 Gill, 460, "literally loaded with debt"; and as it does not appear that there was other property to satisfy the demands of prior creditors, it must be pronounced as against them void.

The case of *Gover v. Owings*, 16 Md. 99, does not exempt this cause from the operation of the general principles of law as above stated. If it be admitted that the husband became by operation of law trustee of his wife, and in that capacity received the money, he could only be responsible for the misapplication of the funds received.

If appropriated with the consent and knowledge of his wife, it cannot be said that he was guilty of a violation of the trust. Being her separate property, all the authorities concur in saying, that in thus permitting the husband to receive it, she is precluded from making any demand: 2 Roper on Husband and Wife, 220 (32 Law Lib.). In the case of *Gover v. Owings*, the wife did not claim the money which was paid to the husband by her consent, but the subsequent payments, made without her knowledge.

The questions decided in *Wickes v. Clarke*, 8 Paige, 161, are not involved in this case. In that case, the personal property conveyed by way of settlement came to the wife by descent; and upon a bill by the creditors of the husband, it was

held that inasmuch as a court of equity would have compelled a settlement in favor of the wife, by the husband, or those claiming under him, there could be no reason for setting aside a settlement voluntarily made. In the case now before the court, the creditors of Somerville are not seeking payment through a court of equity as against the property of the wife, but are claiming that the property of the husband, which by a voluntary conveyance he has attempted to place beyond their reach, shall be held liable to satisfy their just demands.

Judgment affirmed.

VOLUNTARY CONVEYANCE BY HUSBAND TO WIFE, WHEN FRAUDULENT AS TO HIS CREDITORS: See *Belford v. Craze*, 84 Am. Dec. 155, note 163, where other cases are collected.

THE PRINCIPAL CASE IS CITED in *Farmers' and Merchants' National Bank of Baltimore v. Jenkins*, 65 Md. 249, to the point that the relation of debtor and creditor may exist between a husband and his wife, growing out of the receipt by him of her separate estate, under a promise made at the time to repay her, or to invest the same for her use; and in *Grover and Baker S. M. Co. v. Radcliff*, 63 Id. 501, to the point that if a wife sees fit to let her husband have money, which is her separate property, without any express promise to repay her, she cannot afterwards set up a claim against him upon the footing of a creditor.

COCKEY v. COLE.

[28 MARYLAND, 276.]

PROCEEDINGS FOR FORECLOSING MORTGAGES UNDER ARTICLE 64 OF MARYLAND CODE are not special and extraordinary proceedings of which the circuit court has no jurisdiction independent of the statute, but are within the general common-law and chancery powers of that court. The statute gives no new jurisdiction, but only prescribes a summary mode for the exercise of jurisdiction over the subject-matter of which the court had full and ample cognizance, independent of the provisions of the statute. Instead of a regular proceeding for foreclosure, the agreement of parties, as expressed in the power contained in the deed of mortgage, is substituted for a decree of sale, and upon report to and final ratification by the court, the sale has all the judicial sanction that it could have on more formal proceedings.

WHERE SPECIAL AND EXTRAORDINARY POWERS ARE GIVEN BY STATUTE TO COURT in relation to a subject-matter of which such court has no jurisdiction independent of the statute, and the court derives its authority to act entirely from the statute giving the power and prescribing the mode of proceeding, all the requisites of the statute must be strictly complied with in order to render valid the exercise of the power given.

COURT HAVING JURISDICTION HAS RIGHT TO DECIDE EVERY QUESTION arising in the cause, and its decision, whether correct or not, is, until reversed, regarded as binding in every other court. But judgments of a court which acts without authority are regarded as nullities.

SALES RATIFIED BY COURT HAVING JURISDICTION SHOULD BE UPHOLD BY EVERY LEGAL INTENDMENT when they are collaterally attacked. If errors and irregularities exist, they are to be corrected by a direct proceeding, either before the same or an appellate court.

TROVER for the conversion of a crop of wheat. The plaintiff on the trial showed that the crop was sown by him while the land was in his possession and ownership, and that it was cut by Thomas T. Cockey, one of the defendants, and converted to the use of both. Evidence of the value of the wheat was also given. The defendants then offered in evidence the record in the case of *Horwitz v. Cole*, for the purpose of proving that the title to said land and wheat had passed to the defendant, Thomas T. Cockey, before the date of the alleged conversion. The case of *Horwitz v. Cole* was a proceeding for the sale of the land on which said wheat was growing, under a mortgage from Cole and wife to Horwitz. Under this proceeding, the land was sold to Thomas T. Cockey. The plaintiff objected to the admissibility of this record, and the court sustained the objection. The verdict and judgment being against the defendants, they appealed.

E. G. Kilbourn and I. Nevett Steele, for the appellants.

Lewis H. Wheeler and Richard J. Gittings, for the appellee.

By Court, ALVEY, J. There is but one exception in this case, and that raises the single question as to the admissibility of the record offered as evidence for the defendants in the court below. While on the part of the appellants it is contended that the record offered containing proceedings of a court of general and competent jurisdiction should have been admitted as evidence by the court below, it is contended, on the part of the appellee, that the proceedings were *coram non judice*, and that the sale shown to have been made by Horwitz to the defendant, Thomas T. Cockey, was absolutely void; and being so, the record was wholly inadmissible for any purpose whatever. The proceedings in question were had in the circuit court for Baltimore County as a court of equity, and purport to be under and in pursuance of the sixty-fourth article of the Code of Public General Laws, providing the mode of foreclosing mortgages and the distribution of the proceeds of sale of the mortgaged premises. It is urged against the admissibility of the proceedings offered, that no rightful jurisdiction did or could attach in the circuit court where they were had, because of the failure of the mortgagee to give such bond

as was required of him by the sixth section of the article referred to before he proceeded to make sale; and although a bond was given, it is insisted that it was not such as gratified the requirement of the statute, and authorized the making of the sale that was afterwards duly reported and finally ratified by the court. The question of the validity of the bond that was in fact given we do not deem material to decide in this case. The non-conformity of its condition to the requirements of the law may have formed good grounds for objection to the ratification of the sale, but we think it no sufficient ground for declaring, in this collateral way, the whole proceeding a nullity.

The court in which these proceedings took place was not one of special or limited jurisdiction, but of general common-law and chancery powers. Foreclosure of mortgages, and the execution of trusts, were subject-matter peculiarly within its jurisdictional power; and the statute simply provided a summary mode for the exercise of an ordinary jurisdiction. Instead of a regular proceeding for foreclosure, the agreement of parties, as expressed in the power contained in the deed of mortgage, is substituted for a decree of sale, and upon report to and final ratification by the court, the sale has all the judicial sanction that it could have on more formal proceedings. By the very terms of the eighth section of the article of the code already referred to, the general chancery jurisdiction of the court is evoked and brought into active exercise; for it is therein provided that "all such sales shall be reported under oath to the court having chancery jurisdiction where the sale is made, and there shall be the same proceedings on such report as if the same were made by a trustee under a decree of said court." This, therefore, is not the case of special and extraordinary powers given by statute to a court in relation to a subject-matter of which such court has no jurisdiction independent of the statute, and which derives its authority to act entirely from the statute giving the power and prescribing the mode of proceeding. In such case, to render valid the exercise of the power given, all the requisites of the statute must be strictly complied with. But the provisions of the statute upon which the proceedings in question were founded profess to give no new jurisdiction, but only to prescribe a summary mode for the exercise of jurisdiction over the subject-matter, of which the court had full and ample cognizance, independent of the statute provision.

In the proceeding under consideration, it may be that there were errors and irregularities for which the sale would have been set aside, if exception had been taken to its ratification in the direct proceeding, or that the final order of ratification would have been vacated, if an appeal had been taken therefrom; but it does not by any means follow that objection can be sustained, when made for such causes, in a collateral proceeding. For "where a court has jurisdiction, it has a right to decide every question which occurs in the cause; and whether its decision be correct or not, its judgment, until reversed, is regarded as binding in every other court. But if it act without authority, its judgments and orders are regarded as nullities. They are not voidable, but simply void; and form no bar to a recovery sought in opposition to them even prior to a reversal": *Elliott v. Piersol*, 1 Pet. 340.

It was earnestly contended by the appellee's counsel, that the terms of the statute, "before any person so authorized shall make any such sale he shall give bond," are imperative, and that the giving of a proper bond, with condition strictly in conformity to the provisions of the law, was a jurisdictional fact, a condition precedent to the existence of jurisdiction, and that without an exact compliance with the law in this respect the sale must be treated as void. In this, as we have already said, we do not concur. The legal question, as to the sufficiency of the bond, was one for that court to determine in which the proceedings occurred; and whether it determined rightfully or otherwise is immaterial, so far as the validity of the record offered in evidence in this case is brought into question. That court had jurisdiction of the subject-matter; and if its jurisdiction was improvidently exercised, it would be intolerable to hold that its errors could be corrected in a collateral proceeding, at the expense of an innocent purchaser, who had a right to rely upon the final order of ratification of the sale, as the proper exercise of judicial authority. Sales thus sanctioned, when collaterally called in question, should be upheld by every legal intendment.

And as an authority for the position just stated, the case of *Thompson v. Tolmie*, 2 Pet. 157, is full and conclusive, and the reasoning of the court strikingly apposite to the case before us. There the heirs of Tolmie instituted a proceeding in the circuit court for the District of Columbia, for partition of the real estate of their ancestor, and partition was awarded by

the order of the court; but the property being reported indivisible, it was then ordered to be sold, and it was sold accordingly. Afterwards the heirs brought an action of ejectment for the land, and founded their pretension upon the want of jurisdiction in the circuit court to pass the order of sale, or to give the sale legal sanction after it was made. None of the heirs of the deceased had become of age at the time of the sale, and the statute under which the proceedings were had expressly prohibited a sale until the eldest heir was of age; and this was alleged as the defect of jurisdiction. It was contended there, as it has been contended here, that the proceedings did not derive their authority from the general powers of the court, and that, therefore, it should be shown affirmatively that all the requisites of the statute had been strictly observed and complied with, in order to confer jurisdiction, and impart validity to the orders passed in reference to the sale. But the court in disposing of the objection say: "These proceedings were brought before the court below collaterally, and are by no means subject to all the exceptions which might be taken on a direct appeal. They may well be considered judicial proceedings; they were commenced in a court of justice, carried on under the supervising power of the court, and did receive its final ratification. The general and well-settled rule of law in such cases is, that when the proceedings are collaterally drawn in question, and it appears upon the face of them that the subject-matter was within the jurisdiction of the court, they are voidable only. The errors and irregularities, if any exist, are to be corrected by some direct proceeding, either before the same or an appellate court. If there is a total want of jurisdiction, the proceedings are void and a mere nullity, and confer no right, and afford no justification, and may be rejected when collaterally drawn in question." And many cases could be cited to sustain the doctrine thus announced.

In support of the position assumed by the appellee, the case of *McCabe v. Ward*, 18 Md. 505, has been cited and pressed upon us with great earnestness, as being entirely conclusive of the question raised by the exception. And in that case, we admit there are expressions employed by the learned judge who delivered the opinion that might be supposed to embrace and decide the question now involved. But that was a decision made on appeal from an order ratifying the sale, and overruling exceptions taken to it in the direct proceeding,

and therefore unlike the case under consideration, where the question of the legality of the proceedings is brought collaterally before the court. That decision, however, as an authority, can only be relied on as settling the question of the irregularity of the sale made and excepted to in that case. The broad language used in disposing of the question really before the court must be restricted to that; and being so restricted, the case is inapplicable to the question considered in this opinion. This court being of opinion that the court below committed error in rejecting the record offered, the judgment appealed from must be reversed, and *procedendo* awarded.

Judgment reversed and *procedendo* awarded.

ACTION OF COURT, WHEN COLLATERALLY CALLED IN QUESTION, will be referred either to its general or its statutory powers, as may be necessary to sustain its jurisdiction: *Goudy v. Hall*, 87 Am. Dec. 217, note 222.

JUDGMENT OF COURT HAVING JURISDICTION THOUGH ERRONEOUS CANNOT BE COLLATERALLY IMPEACHED; See *Joyce v. McAwoy*, 89 Am. Dec. 172, note 184, where other cases are collected; *Dorsey v. Garey*, 30 Md. 494; *Ruggles v. First National Bank of Centreville*, 43 Mich. 198, both citing the principal case.

SALES SANCTIONED BY COURT OF COMPETENT JURISDICTION SHOULD BE UPHOLD by every legal intendment, when they are collaterally attacked: *Schley v. Mayor etc. of Baltimore*, 29 Md. 46; *Morris v. Gelston*, 34 Id. 420; *Warehime v. Carroll Co. B. A.*, 44 Id. 517, all citing the principal case.

POWER TO FORECLOSE MORTGAGE IS ONE OF USUAL ATTRIBUTES OF COURT OF CHANCERY: *Warfield v. Dorsey*, 39 Md. 308, citing the principal case.

BALTIMORE AND OHIO RAILROAD Co. v. GLENN.

[28 MARYLAND, 287.]

DOMICILE OF CORPORATION IS IN STATE BY WHOSE LAW IT IS CREATED, and it cannot have any legal existence out of the boundaries of that state. It must dwell in the place of its creation, and cannot migrate to another sovereignty.

CORPORATION CANNOT RESIDE IN TWO STATES AT SAME TIME under the one charter. But a corporation of one state may by its agents make a contract within the scope of its limited powers in a sovereignty in which it does not reside, provided such contract is permitted to be made by the law of the place.

VALIDITY OF DEED MADE BY CORPORATION CREATED BY LAW OF VIRGINIA must be determined by the laws of that state. If it be legal there, it is so here, unless it violates good morals or is repugnant to some law or policy of this state. If it be fraudulent and void according to the law of Virginia, the fraud attaches to it here, and vitiates it.

NO LAW OR RULE OF CONSTRUCTION IN MARYLAND PROHIBITS ENFORCEMENT OF CONTRACT not made in this state, according to the law of the place where it was made, although citizens of Maryland, from reasons of state policy, may not be permitted to make a similar contract here.

UNWRITTEN LAW OF FOREIGN STATE IS TO BE PROVED by testimony of experts; the statutory law thereof is to be proved by the law itself, or by an exemplified copy.

DEED IS NOT UPON ITS FACE OR BY ITS PROVISIONS INVALID BY LAWS OF VIRGINIA which is executed in that state by a corporation thereof, purporting to convey all its property to trustees for the benefit of its creditors, and reserving to itself the enjoyment of the property under the title to the trustees from the 20th of September to the 1st of November following, and longer if the trustees should not be required to take possession by one or more of the creditors thereby secured; requiring the trustees to pay out of the trust fund all debts that should become due from the grantor to its officers and agents between those dates, while it should be using its property under said reservation; and also requiring the trustees to pay out of the trust funds all debts which the grantor, an express and transportation company, might incur to railroad companies for transportation during said period, over and above the net receipts for such transportation; and reserving to the grantor absolutely all tolls and compensation for the transportation of express matter not then delivered to consignees, nor transported, although under existing contracts.

BILL filed by W. W. Glenn against the National Express and Transportation Company, J. B. Hoge, J. J. Kelley, and C. O. O'Donnell, trustees of said company, the Baltimore and Ohio Railroad Company, and the Bank of Commerce, on behalf of himself and such other creditors of said express company as might become parties to the suit and agree to contribute to the costs of prosecuting the same. The bill charged that said express company executed to said trustees the deed referred to in the opinion, upon the trusts enumerated in the opinion. It further charged that said company was largely indebted to said Glenn, and that an agreement was entered into between him and it, whereby upon certain conditions he agreed to extend the time for the payment of its indebtedness to him; that it did not comply with any of said conditions, and that the execution of said deed of trust was a violation of said agreement, and should not be permitted to stand to his injury; that said deed was fraudulent and void, and ought to be so declared. The bill also asked for an injunction to restrain said express company and the trustees thereof from disposing of any of the property, and from applying any part thereof to the purposes mentioned in said deed, or from suffering or permitting said property to be used by said company in the manner provided in said deed. It also asked for the appointment of a receiver. An injunction was

issued as prayed for. The express company and the trustees filed their answer, and moved to dissolve the injunction. The company admitted its incorporation in Virginia, and its indebtedness to Glenn. It also admitted the execution of the deed, but denied that it was done to hinder or defraud creditors, but on the contrary, alleged that it was done with a *bona fide* purpose to make the most effectual and equitable provision for the payment of all its creditors that was then practicable. It denied that it was insolvent, and alleged that it had assets sufficient to pay all its debts. It insisted that said deed was, by the law of Virginia, where it was executed, valid and effectual to all intents and purposes as against creditors and all other persons. It further insisted that the validity, force, and effect of said deed were to be determined by the law of Virginia, and denied that the making of said deed was inconsistent with the rights of the complainant under the agreement mentioned in his bill. The trustees alleged that they had been prevented by the injunction from effectually executing the trusts confided to them by the deed, but asserted their readiness to carry the same into effect whenever permitted. They asserted that the appointment of a receiver was unnecessary. The court, on hearing the motions to dissolve the injunction and for a receiver, continued the injunction and appointed a receiver. Afterward, the Baltimore and Ohio Railroad Company and the Bank of Commerce filed answers. Commissions were then issued, and testimony was taken on both sides. The railroad company renewed the motion to dissolve the injunction, which was overruled. The railroad company and the trustees then appealed from the order granting an injunction, and from the orders refusing to dissolve the injunction, appointing a receiver, and refusing to discharge said receiver; and also from an order requiring the president of the express company to execute deeds of all the property to the receiver. Other facts appear from the opinion.

J. H. B. Latrobe and I. N. Steele, for the Baltimore and Ohio Railroad Company.

Charles W. Russell, for Hoge and O'Donnell, trustees for the express company.

Charles Marshall and Thomas G. Pratt, for the appellees.

By Court, STEWART, J. The able argument of the counsel on both sides, in this cause, has been mainly directed to the

consideration of the validity and effect of the deed of the 20th of September, 1866, made by the express company to the trustees. The invalidity of this instrument is the sole reliance of the complainant, upon which all the other proceedings depend. Our conclusion upon that proposition will dispose of this appeal. The question is one of much importance, and having been reargued, has been examined with more than ordinary care. The bill of complaint, the deed itself, the agreement of counsel filed, the proceedings and testimony, all represent that this express company is a body politic and corporate of the state of Virginia. The deed purports to have been signed by Joseph E. Johnston, president of the company, by virtue of authority vested in him by an order and resolution of the board of directors of the company, and that he affixed the common seal of said corporation to the deed, as the act of the corporation. The agreement filed further admits that the office of the president of the company has been kept at Richmond; that the deed was executed there and admitted to record, according to the law of Virginia. It further admits, that at the time of the execution of the deed, and for several months previously, the company had an office in the city of Baltimore, at which the offices of its treasurer and general superintendent were kept, and a large amount of the general business transacted.

The grantor being a corporation of the state of Virginia, its domicile is there. In the case of *Bank of Augusta v. Earle*, 13 Pet. 519, Chief Justice Taney states that "a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created. It exists by force of the law, and where that ceases to operate, the corporation can have no existence. It must dwell in the place of its creation, and cannot migrate to another sovereignty."

It was urged in the argument for the appellees that the company by transacting business, having an office and its treasurer and superintendent here, acquired a habitation at the same place. This could make no difference, if not only those offices, but the office of the president also, had been here. They were but the agencies of the corporation. In the same case, *Bank of Augusta v. Earle*, *supra*, the doctrine is plainly announced that "although it [the corporation] must live in that state only [the state from which its charter is derived], there is no insuperable objection to its power of contracting in another. Natural persons through the intervention of agents

are continually making contracts where they do not reside, and what greater objection can there be to an artificial person, by its agents, to make a contract within the scope of its limited powers in a sovereignty in which it does not reside, provided such contracts are permitted to be made by the laws of the place?" Article 75, sections 99-104, and article 88, sections 33-44, of the Code of Public General Laws, provide for enforcing process against the agents of a corporation having existence beyond the state, but holding and exercising franchises therein, thus recognizing their authority to transact business here. Natural persons having no residence here may have dealings through their agents, but that gives them no domicile here, much less a corporation, whose corporate franchises, being against common right, are construed more strictly; natural persons may change their domicile; not so with corporations, who have a stationary habitation, and can only have transactions from their home through their agents. Personal and individual rights are original, whilst the powers of a corporation are derivative and prescribed by their charters.

The authority in *State v. Northern Central R'y Co.*, 18 Md. 213, relied upon the appellees to sustain their view that the company doing business here must be considered as having a domicile here, we think sustains our conclusion. In that case the corporation held its existence by two charters from different states, or its existence in part from a charter of another state. "Such a corporation must, for the purposes of justice, be treated as a separate corporation by the courts of each government from which it derives its being, that is, as a domestic legal entity to the extent of the government under which it acts, and as a foreign corporation as regards the other sources of its existence." This is in accordance with the principle we have stated, because having two charters, it is as to each distinct, and is treated in each state giving it being as a legal entity. If this corporation held a charter from the state of Maryland, it would have a domicile here to the extent of that authority. But deriving its charter from Virginia alone, that state must be esteemed its domicile exclusively. It could not reside here and in Virginia at the same time under the one charter.

The deed in question having been made in the state of Virginia, and by a corporation created by the laws of that state, its validity must depend upon those laws. "It is a general principle admitting of few exceptions that in construing con-

tracts made in a foreign country the courts are governed by the *lex loci* as to the essence of the contract; that is, the rights acquired and the obligations created by it": *De Sobry v. De Laistre*, 2 Har. & J. 191 [3 Am. Dec. 533]; *Trasher v. Everhart*, 3 Gill & J. 244. The rule of comity, where the *lex loci* is foreign, adopts the law of the country where the contract is made in placing a construction upon it. They look to the foreign law to ascertain the true character of the contract that efficacy may be given to its obligations between the parties, unless *contra bonos mores*, or against some positive law of their own. This is necessarily the rule; otherwise no reasonable interpretation could be given to such contract. It can have no validity except conformable to the law where made. It must have a legal origin. "No right can be derived under any contract made in opposition to the law where it is made": *Hall v. Mullin*, 5 Har. & J. 193.

"Courts of justice always expound and execute it [the contract] according to the laws of the place where made": *Bank of Augusta v. Earle*, 13 Pet. 588. Judge Story, in his *Conflict of Laws*, says: "In the silence of any rule affirming, denying, or restraining the operation of foreign laws, courts of justice presume the tacit adoption of them by their own government, unless repugnant to its policy or interest. It is not the comity of the courts, but of the nation, which is administered in the same way and guided by the same reasoning, by which all other principles of municipal law are ascertained." In other words, the universal interests of all enlightened nations prescribe this as common law to be administered by their courts.

If this deed is a legal instrument in Virginia, where it was made, it is so here, unless it violates good morals or is repugnant to some law or policy of this state. If it is fraudulent and void according to the law of Virginia, the fraud attaches to it here and vitiates it. Is the recognition of the validity of this deed obnoxious to any law or policy of this state?

We are not aware of any law or rule of construction which prohibits the enforcement of a contract not made in this state; according to the law of the place where it was made, although our citizens, from reasons of state policy, may not be permitted to make a similar contract here. A different rule would be to attempt the enforcement of our local policy upon all other people, and recognize no contract not conformable to our peculiar views.

Transfers of personal property within our limits, belonging

to parties abroad, may be made according to the foreign law, where our own citizens, in transferring similar property, are required to conform to our laws regulating such transfers: *Wilson v. Carson & Co.*, 12 Md. 54; *Houston v. Nowland*, 7 Gill & J. 480. The case of *Gardner v. Lewis*, 7 Gill, 377, was between citizens of Maryland who had gone outside of the state and made a contract, and there was no evidence of what was the foreign law, and therefore the law of Maryland was the only one to be applied. In *Green v. Treiber*, 3 Md. 28, the deed was set aside as being contrary to the law of Maryland, having been executed by parties in the state of Virginia; but there was no evidence of what was the law of that state. It is not material to this inquiry to define what would be our construction of such a deed as this if made here according to our views of the statute of 13 Eliz., c. 5; because, having been made in Virginia by a corporation having its domicile there, its validity must be determined according to that law. The deed has been assailed by the bill of complaint as fraudulent upon its face, and because of its alleged illegal reservations and preferences; because it reserves a use to the grantor to hold the property under the title of the trustees from the 20th of September to the 1st of November ensuing, if the trustees be not required to take possession; because it requires the trustees to pay out of the trust fund all debts that shall become due from the grantor to its officers and agents for a like period; because it requires the trustees to pay out of the trust funds all debts which the grantor may incur to railroad companies for transportation, from September 20th to November 1st, over and above the net receipts for such transportation; because it reserves to the grantor all tolls and compensation for the transportation of express matter not yet delivered to consignees, or not yet transported under existing contracts.

These are the principal objections made, and which are embraced by the first, fifth, and eighth reservations and clauses of the deed. Are these reservations fatal to the validity of the deed according to the Virginia law?

That law is a fact to be proved in our courts as other facts: if unwritten, by the testimony of experts; if statutory, by the law itself or exemplified copy: *Gardner v. Lewis*, 7 Gill, 377; *De Sobry v. De Laistre*, 2 Har. & J. 191 [3 Am. Dec. 533].

As to what is the Virginia law applicable to the character of this deed, it seems assumed we are confined to the testimony of the experts, introduced under the commission, so far

as the Baltimore and Ohio Railroad Company is concerned, because they are not parties to the agreement, admitting resort to other sources. It is not necessary to decide as to the correctness of this assumption, because there is no conflict between the testimony of the witnesses and the reported decisions of the Virginia courts. These witnesses, the experts, Grattan, Steger, Carrington, Page, Imboden, Baldwin, and Hunter, eminent jurists, and experienced in the law of Virginia, testify that under that law the deed is valid, and its provisions would be recognized as legal for the purposes set forth in it. Such is the uniform tenor of this evidence, which is conclusive, as to the validity of this deed under the Virginia law, outside of the agreement in the cause.

Besides this testimony of the experts, the agreement of the trustees, the express company and the complainant, requires us to resort to the decisions of the courts, or opinions of judges of Virginia, reported in any printed book, etc., to ascertain the law of that state pertinent to this question. From the examination we have given to the reports of the Virginia courts, construing this statute of 13 Elizabeth, its construction has undergone modifications in their courts very analogous to the changes which have taken place in the courts of other states, and in England, since the trial of Twyne, who was one of the first victims to the penal provisions of that law.

The court of appeals of the state of Virginia, in the case of *Davis v. Turner*, 4 Gratt. 422, announce very distinctly a change in their construction of this statute of 13 Elizabeth, contrary to a series of prior decisions. Judge Baldwin "expressed his opinion against the doctrine that the non-delivery of possession on a sale is in itself in all cases conclusive evidence of fraud, and against the principle that the inconsistency of the possession with the terms and effect of the deed is also conclusive evidence of fraud, holding that the fraud contemplated by the statute is to be found in the falsehood of the transaction." Upon a review of the Virginia cases, he added, that "it seems now conceded on all hands the continued possession of the vendor after an absolute sale is open to explanation."

Judge Cabell stated "that an entire change had taken place in his views; that he was now entirely convinced of the correctness of the modern English decisions."

In the later case of *Forkner v. Stewart*, 6 Gratt. 198, 204, the court "declared that the proper instruction to be given to

the jury was, that if it appeared to them that an absolute sale had been made, but that the possession did not accompany such sale, but remained with the vendor, such retention of possession was *prima facie* evidence of fraud, but not conclusive, and could be rebutted by proof of the fairness and good faith of the transaction."

In the later case of *Dance v. Seaman*, 11 Gratt. 778, much relied upon by appellees' counsel, the court say: "The fact that creditors may be delayed is not of itself sufficient to vacate a deed if there is absence of fraudulent intent. Every conveyance to trustees interposes obstacles in the way of the legal remedies of creditors, and may to that extent be said to hinder creditors. The fraudulent intent is denied by the grantor, and there is no proof except that arising from the face of the deed; that the court cannot presume the fraud, unless the terms of the instrument preclude any other inference; that the reservation of an interest in the property by postponing the time of sale, or directing a sale on a credit, etc., do not of themselves furnish evidence of fraudulent intent; that such questions have been settled by a series of adjudications in that court; that it would disturb titles if the principle heretofore established by the practice of the courts were now to be questioned; that if inconvenience result from the construction given to the statute, the correction should be administered by the law-making power."

Nor does the case of *Quarles v. Kerr*, 14 Gratt. 54, 58, referred to by appellees' counsel, sustain their theory. The deed in that case was set aside owing to the circumstances of that case, the court saying "that a delay of two years was equivalent to giving up all claim to the property; that the courts in Virginia have gone as far, or further, to sustain the owner's dominion; that the owner may in good faith convey his property, or a part of it, to secure the payment of his debts; may postpone for a reasonable time (to be judged of in each case), the period for executing the powers of the conveyance," etc.

From the purport of these decisions, we do not perceive that the law of Virginia is different, from the exposition of it by the testimony of the experts. The Virginia doctrine as to the construction of this celebrated statute of 13 Eliz., c. 5, amounts to this, that the presumption of fraud to be deduced from the face of a deed, where its provisions may be explained as consistent with good faith, is discountenanced if not exploded.

The impeached instrument is valid, or otherwise, according to the evidence of its fairness or fraud; the purpose—the fraudulent intent—is the subject of proof, and not necessarily to be inferred by any fixed and inflexible rule of law; that the courts will not as a general rule pronounce from the face or terms of a deed that it is fraudulent, but permit the fullest investigation to be made by proof as to any fraudulent intent, or otherwise, admitting evidence *dehors* to determine the fraud or honesty of purpose, thus giving what they appear to consider a more reasonable construction of the statute.

From all the testimony, we conclude the law of Virginia does not invalidate this deed from its face or provisions, and there is no evidence *aliunde* to authorize this court to declare it invalid. Differing from the circuit court in its construction of this deed, we reverse the orders of that court, from which appeals have been taken; the injunction must be dissolved, and the cause remanded for further proceedings in the court below to accord with this reversal. The validity of the sales made by the receiver in the discharge of his duty as an officer of that court is not to be affected by this decision, nor his accountability for the proceeds of sale, or other funds remaining in his hands, but he may be required to account with the trustees in the further proceedings in the court below; the costs of these appeals to be paid out of the funds in the hands of the receiver.

Orders reversed, injunction dissolved, and cause remanded.

CORPORATION HAS DOMICILE IN PLACE OF ITS CREATION, and can have no legal existence beyond the limits of the sovereignty which created it: *County of Allegheny v. Cleveland etc. R. R. Co.*, 88 Am. Dec. 579, note 581, where other cases are collected. The directors of a corporation may, however, hold meetings, have an office, make contracts, and transact at least a part of the general business of the corporation in another state, unless the local law prohibits it. But the directors when so acting are not the corporate body, but its mere agents: *Smith v. Silver Valley Mfg. Co.*, 64 Md. 91, citing the principal case.

LEX LOCI CONTRACTUS DETERMINES WHAT CONTRACT IS: See *Galliano v. Pierre*, 89 Am. Dec. 643, note 647, where other cases are collected. But contracts intended to be performed in another state must conform to the laws of that state: *Stricker v. Tinkham*, 89 Id. 280, note 281, where other cases are collected.

SPRIGG v. MOALE.

[28 MARYLAND, 497.]

LESSORS OF PLAINTIFF IN EJECTMENT, CLAIMING BY COLLATERAL DESCENT, MUST SHOW who was last legally seised of the land in controversy, and then prove his death without issue; and next prove all the different links in the chain of descent, which will show that the person so last seised and the claimants descended from some common ancestor, together with the extinction of all those lines of descent which could claim in preference to the lessors of the plaintiff. They must prove the marriages, births, and deaths, and the identity of persons necessary to fix title in themselves, to the exclusion of others who would have, if in existence, a better title to the land sought to be recovered. The first facts to be established by them, in the deduction of title, are, that the *propositus* died before the bringing of the action, and that he died without issue.

DEATH OF PERSON MAY BE PRESUMED TO HAVE HAPPENED BEFORE BRINGING OF SUIT, where it would be contrary to the ordinary course of nature that he should be living at that time, although there is no legal presumption of the period when death occurred, or up to which life endured.

IF IT BE ALLEGED THAT PERSON DIED, OR WAS DEAD, at any particular time within the period after which he will be presumed to be dead, the fact must be established by evidence.

LAW MAKES NO PRESUMPTION AGAINST ISSUE, where the party is shown to have been married, and his wife to have been living at the time of the last intelligence of her. But the plaintiff must show either that he had no issue, or that issue is extinct.

WHERE WHOLE EVIDENCE IS TRADITIONARY, CONSISTING ENTIRELY OF FAMILY REPUTATION or of statements of declarations made by persons who died long ago, it must be taken with such allowances and suspicions as ought reasonably to be attached to it. When family reputation, or declarations of kindred made in a family, are the subject of evidence, and the reputation is of long standing, or the declarations are of old date, the memory as to the source of the reputation, or as to the persons who made the declarations, can rarely be characterized by perfect accuracy.

IT IS DUTY OF COURT TO INSTRUCT JURY THAT THERE IS NO EVIDENCE legally sufficient to be considered by them, when, looking to the whole evidence adduced, and considering its quality and general tenor, and after deducing all reasonable inferences therefrom, it is satisfied that it is not legally sufficient to constitute the foundation for a verdict, and that a verdict founded upon it could not in justice and judicial propriety be allowed to stand.

EJECTMENT. The opinion states the case.

George H. Williams and Arthur W. Machen, for the appellants.

William Schley, for the appellees.

By Court, *ALVEY, J.* This is an action of ejectment, in which the lessors of the plaintiff claim title to the land in

dispute as heirs at law, in different degrees, of Jacob Giles, by collateral descent. It appears that John Giles, the father, who died in the year 1725, had, some time before his death, compounded for a tract of land called Upton Court, lying on the Patapsco River, in Baltimore County, but died before he obtained a patent therefor; and by his will, dated and admitted to probate in 1725, he devised a part of Upton Court to his son John Giles, and the residue thereof to his son Jacob Giles. This will of the elder John Giles discloses the fact that he had, at the date of the will, eight children, three sons and five daughters, namely, John, Jacob, Nathaniel, Betty Lewis, Sophia Murray, Anna, Mary, and Sarah. The three sons were made executors of the will of the father. It also appears that on the 12th of August, 1731, a patent for Upton Court issued to John Giles, the son and devisee, who, by deed of the 28th of February, 1732, granted, released, and confirmed to his brother Jacob Giles all that part of Upton Court which had been devised to the latter by the will of the father; and on the 1st of March, 1732, Jacob Giles conveyed to John Moale, the ancestor of the appellee, a parcel of Upton Court, supposed to contain two hundred acres, more or less; but that such conveyance to Moale did not embrace the entire portion of Upton Court conveyed to Jacob Giles by the deed of his brother of the 28th of February, 1732. And it is for the recovery of the residue of such parcel of Upton Court, conveyed by the deed of the 28th of February, 1732, and not embraced in the deed to Moale, that this action is brought. It is alleged that Jacob Giles never parted with such residue of the parcel of Upton Court conveyed to him by his brother, and that he died without issue and intestate; and that all the blood of John Giles the elder has become extinct, except the descendants of Anna or Anna Maria, one of the daughters of John Giles, Sen., and a sister of Jacob, who married Oliver Cromwell, and had issue; and that the lessors of the plaintiff are her descendants, and through her claim as heirs at law of Jacob Giles.

At the trial below there were several prayers offered by the respective parties; and eight of those on the part of the plaintiff were granted, as were two of those on the part of the defendant. The ninth prayer, however, of the plaintiff was refused; and that, and the two prayers of the defendant that were granted, presented the question of the title of the lessors of the plaintiff, and their right to recover in this action. The

court, after ruling upon the prayers offered, further instructed the jury that the plaintiff could not recover; and upon the ruling in reference to the ninth prayer of the plaintiff, and the decisive instruction of the court against the right of the plaintiff to recover, the primary question is presented, whether there was evidence in the cause legally sufficient to be considered by the jury, tending to establish title in the lessors of the plaintiff. It was incumbent upon the lessors of the plaintiff, claiming as they do by collateral descent, to show who was last legally seised of the land in controversy, and then to prove his death without issue; and next to prove all the different links in the chain of descent, which will show that the person so last seised and the claimants descended from some common ancestor; together with the extinction of all those lines of descent which could claim in preference to the lessors of the plaintiff. They must prove the marriages, births, and deaths, and the identity of persons necessary to fix title in themselves, to the exclusion of others who would have, if in existence, a better title to the land sought to be recovered. The facts first in order to be established by the lessors of the plaintiff, in the deduction of title, were, that Jacob Giles, the *propositus*, died before the bringing of this action; and that he died without issue; as his lineal descendants, if any, would exclude all collateral kindred. It is contended, however, on the part of the plaintiff, that both of these facts are made evident by presumption, under the facts and circumstances of this case. As to the fact of the death of Jacob Giles, we think it clear that it may be presumed to have happened before the bringing of this suit, because it would be contrary to the ordinary course of nature that he should be living at that time; though there is no legal presumption of the period when death occurred, or up to which life endured: Hubback on Succession, 185. If it be alleged that a person died or was dead at any particular time within the period after which he will be presumed to be dead, the fact must be established by evidence. But while this is the rule of presumption as to the fact of death, it does not follow that the party is presumed to have died without issue. Where, as in this case, the party is shown to have been married, and his wife living at the time of the last intelligence of her, the law makes no presumption against issue; and the plaintiff must show either that he had no issue, or that issue is extinct. That there is no legal presumption that the party died without issue, we think has been

expressly decided in the case of *Richards v. Richards*, 15 East, 293, note, and which has been cited and approved by the court of appeals of this state in the case of *Hammond v. Inloes*, 4 Md. 175. The case referred to in East was an action of ejectment, and the lessor of the plaintiff claimed as heir by descent, and showed the death of his elder brothers, but not that they died without issue. The court said: "This must likewise be proved. The plaintiff must remove every possibility of title in another person before he can recover; no presumption being admitted against the person in possession." And in Hubback on Succession, 199, it is laid down as an established principle in the rules of evidence applicable to cases of succession, that "in order to show the death of all nearer heirs, it is necessary to negative the coming into existence of those who would be such. That without the establishment of the non-existence of issue as a distinct species of fact from that of death, the proof of heirship would be defective, will thus appear: if A be a nearer heir than the claimant, and it be proved that he died, having had two children, B and C, and the deaths of these children be also proved, the claimant is not entitled to succeed if issue of either B or C, or if other issue of A be extant. Evidence may be adduced of the deaths of all the known members of senior branches through successive generations, and still the task will follow of satisfying those who are to decide that no issue exists of the lowest or latest descendants, added to that of establishing of each individual member that he had no other children than those who have been accounted for." Therefore the fact of dying without issue is not made out by legal presumption. Nor do we think it is made out by presumption of fact.

The testimony given in reference to Jacob Giles and the Giles family was of the most vague and indefinite character, and such as from which no satisfactory conclusion could have been drawn. The witnesses upon whose deposition reliance is placed to establish the extinction of all the blood of John Giles, Sen., except that through Anna Maria Cromwell, were Henry Linthicum, Elizabeth Linthicum, and Mrs. Matilda H. Stewart. The first-named witness says he had no acquaintance with the Giles family. He married into the Cromwell family, and he traces with sufficient accuracy the pedigree of that family, and shows it to be very extensive. He says he had "understood from his wife that the children of John Giles, Sen., were John Giles, Jr., and Jacob Giles, and, he thinks,

Nathaniel Giles and Anna Maria Giles. Witness thinks John Giles, Jr., left two daughters, but does not remember their names, but thinks one of them was named Sarah and the other Elizabeth; and does not know whether they were married, but thinks he understood that they did not marry, but is not sure about it. Witness never heard of any issue from Jacob, and he thinks he understood he died without issue." This witness's knowledge, gathered from his wife, or whatever other source, seems to be exceedingly defective so far as it concerns the Giles family. He seems never to have heard of Betty Lewis, Sophia Murray, Mary, and Sarah Giles, daughters of John Giles, Sen., and who were certainly alive at the date of their father's will, in 1725. Nor does he seem to have heard anything of the four children of Nathaniel Giles, named in his will of 1730. It is manifest, therefore, that the traditionary knowledge of this witness in regard to the several branches of the Giles family, except the one to which he was connected by marriage, was very imperfect and unreliable. The testimony of Mrs. Elizabeth Linthicum is even less definite than that of Henry Linthicum. She says she had "always understood from her family that John Giles was the father of said Anna Maria Giles, and that John Giles had a son named Jacob Giles, and two other sons whose names were Nathaniel Giles and John Giles. Witness never heard any talk of the son John Giles until lately, and does not know that he had any children." And the testimony of Mrs. Stewart, most relied on by the plaintiff, is characterized more for the absence of knowledge upon the subject than for any definite proof that it furnishes in regard to the Giles family. She says that Anna Maria Cromwell was the daughter of John Giles the elder, "who had also children named Jacob, Nathaniel, and John Giles." She says nothing of the other daughters of John Giles, Sen. She further says: "I have never heard of any descendants of Jacob Giles, Nathaniel Giles, or John Giles; if they had any descendants, they are long since dead. I know of no descendants of old John Giles living, except the descendants of Anna Maria Giles by her husband Oliver Cromwell. . . . I never saw Nathaniel, Jacob, or John Giles. They died long ago. I don't know where Nathaniel and Jacob died." Now, it will be observed that though this lady says she had never heard of any descendants of Nathaniel and John Giles, it is certain that they both left children, if their wills can be relied on as proof of the fact. Because she had never heard

of any descendants of either Jacob, John, or Nathaniel Giles, it is hardly fair to conclude that they never had any, or that they were all dead; especially as we have the most reliable evidence that two of them had descendants. And this is all the evidence in the cause from which the jury could have found that the only surviving blood of John Giles, Sen., was in the descendants of Anna Maria Cromwell, and to constitute the ground of the plaintiff's right to recover in this action. To this evidence, the observations of Lord Langdale, M. R., made in the case of *Johnson v. Todd*, 5 Beav. 599, are strikingly applicable, and no stronger case could be furnished to exemplify their truth and wisdom than the present. "In cases," said he, "where the whole evidence is traditionary, when it consists entirely of family reputation, or of statements of declarations made by persons who died long ago, it must be taken with such allowances, and also with such suspicions, as ought reasonably to be attached to it. When family reputation, or declarations of kindred made in a family, are the subject of evidence, and the reputation is of long standing, or the declarations are of old date, the memory as to the source of the reputation, or as to the persons who made the declarations, can rarely be characterized by perfect accuracy."

And although the weight of evidence is for the jury, yet when the question is raised, as it is here, as to whether there be any evidence legally sufficient to be submitted to them to enable them to find the facts sought to be established, it becomes the duty of the court to look to the whole evidence adduced, and determine as well from its quality as its general tenor whether, after deducing all reasonable inferences therefrom, it be legally sufficient to constitute the foundation of a verdict,—whether a verdict founded upon it could in justice and judicial propriety be allowed to stand. If not, it is clearly the duty of the court to instruct the jury that there is no evidence legally sufficient to be considered by them. That was done in this case, and we think rightfully done. If the testimony of the witnesses referred to contains any probative force at all in regard to Jacob Giles, it is to establish the fact of his death before the year 1787, the time when the act of 1786, to regulate descents, went into operation. Henry Linthicum was eighty-one of years of age when he was examined in 1857, and Mrs. Elizabeth Linthicum, examined in 1855, was then in her eighty-sixth year, and was therefore about eighteen years of age in January, 1787. And although

connected with the family, and of such great age, neither of these witnesses has any other knowledge that such a person as Jacob Giles ever existed than through vague tradition. It would not seem to be probable that if her uncle had been living in 1787 Mrs. Linthicum would not have known it, and have knowledge of his subsequent death. Yet, she only speaks of having understood in her family that John Giles, Sen., had a son named Jacob; and she had never heard any talk of John Giles, Jr., until lately. And if it be true that Jacob Giles died before January, 1787, though he may have died intestate, and without issue, the descent would have been according to the rule of the common law, and all the female lines excluded until the entire extinction of those of the male.

As we discover no error in the rulings of the court below, its judgment will be affirmed.

Judgment affirmed.

PRESUMPTION OF DEATH. — There is no presumption of law relative to the duration of human life in the abstract. Best says that "in one case the court of queen's bench said that they could not assume judicially that a person alive in the year 1034 was not still living in 1827": Best on Presumptions, sec. 139, citing *Atkins v. Warrington*, 1 Chit. Pl. 258, 6th ed. In *Peabody v. Hewett*, 52 Me. 33, S. C., 83 Am. Dec. 486, it was held that a party must be treated as living where no evidence is introduced to show his death. Lampkin, J., in delivering the opinion of the court in *Watson v. Tindal*, 24 Ga. 494, S. C., 71 Am. Dec. 142, said: "The civil law will presume a person living at a hundred years of age, and the common law does not stop much short of this." See also *Hayes v. Bernick*, 2 Mart. (La.) 138; S. C., 5 Am. Dec. 727; *Eagle's Case*, 3 Abb. Pr. 218. Death is not conclusively presumed from proof of the extreme old age of a party when last heard from; as where it appeared that a party whose death was in question in 1857 was a Revolutionary soldier: *Watson v. Tindal*, 24 Ga. 494; S. C., 71 Am. Dec. 142. Nor does the presumption of death arise from the fact that the person who, twenty-two years before, was in "bad health," would, if now living, be eighty years old, where there is no evidence offered to show the sort or degree of "bad health," or of inquiries having been made among his friends: *In re Hall*, 1 Wall. Jr. 85; Lawson on Presumptive Evidence, 194. There is no absolute presumption of law as to the continuance of life, nor any absolute presumption against a party doing an act because the doing of it would make him guilty of an offense against the law. In every instance the circumstances of the case must be considered: *Lapeley v. Grierson*, 1 H. L. Cas. 498; *Rex v. Harborne*, 2 Ad. & E. 540, explaining *Rex v. Twynning*, 2 Barn. & Ald. 386; Best on Presumptions, sec. 49. Said Lord Denman, C. J., in *Rex v. Harborne*, *supra*: "I must take this opportunity of saying that nothing can be more absurd than the notion that there is to be any rigid presumption of law on such questions of fact without reference to accompanying circumstances, such, for instance, as the age or health of the party. There can be no such strict presumption of law."

The fact of death may, however, be proved by presumptive evidence as

well as by direct evidence. A person who has been absent from his home or the place of his last residence for seven years without having been heard of by those persons who, if he had been alive, would naturally have heard of him, is presumed to be dead at the expiration of that term: Best on Presumptions, sec. 140; Lawson on Presumptive Evidence, 200; *Rust v. Baker*, 8 Sim. 443; *Ommaney v. Stilwell*, 23 Beav. 328; *Moffit v. Varden*, 5 Cranch C. C. 658; *In re Hall*, 1 Wall. Jr. 85; *Montgomery v. Bevans*, 1 Saw. 653; *Davie v. Briggs*, 97 U. S. 628; *Ashbury v. Sanders*, 8 Cal. 62; S. C., 68 Am. Dec. 300; *Crawford v. Elliott*, 1 Houst. 465; *Doe v. Flanagan*, 1 Ga. 538; *Adams v. Jones*, 39 Id. 479; *Ryan v. Tuleor*, 31 Kan. 366; *Foulke v. Rhea*, 7 Bush, 568; *Jamison v. Smith*, 35 La. Ann. 609; *Stevens v. McNamara*, 36 Me. 176; S. C., 58 Am. Dec. 740; *Wentworth v. Wentworth*, 71 Me. 72; *Rockland v. Marrell*, 71 Id. 455; *Tilly v. Tilly*, 2 Bland Ch. 436; *King v. Fowler*, 11 Pick. 302; S. C., 22 Am. Dec. 370; *Loring v. Steineman*, 1 Met. 204; *Spears v. Burton*, 31 Miss. 547; *Learned v. Corley*, 43 Id. 687; *Lajoie v. Primm*, 3 Mo. 529; *Hancock v. American Life Ins. Co.*, 62 Id. 26; *Thomas v. Thomas*, 16 Neb. 553; *Smith v. Knowlton*, 11 N. H. 191; *Forsaith v. Clark*, 21 Id. 409; *Clarke v. Canfield*, 15 N. J. Eq. 119; *Hoyt v. Newbold*, 45 N. J. L. 219; S. C., 46 Am. Rep. 757; *King v. Paddock*, 18 Johns. 141; *McCartee v. Camel*, 1 Barb. Ch. 455; *Eagle's Case*, 3 Abb. Pr. 218; *Seligman v. Sonneborn*, 1 How. Pr., N. S., 465; *Lewis v. Mobley*, 4 Dev. & B. 323; S. C., 34 Am. Dec. 379; *University v. Harrison*, 90 N. C. 385; *Rice v. Lumley*, 10 Ohio St. 596; *Rosenthal v. Mayhugh*, 33 Id. 155; *Youngs v. Heffner*, 36 Id. 232; *Miller v. Beates*, 3 Serg. & R. 490; S. C., 8 Am. Dec. 658; *Innis v. Campbell*, 1 Rawle, 373; *Bradley v. Bradley*, 4 Whart. 173; *Whiteside's Appeal*, 23 Pa. St. 114; *Holmes v. Johnson*, 42 Id. 159; *Godfrey v. Schmidt*, Cheves, pt. 2, p. 57; *Woods v. Woods*, 2 Bay, 476; *Craig v. Craig*, 1 Bail. Eq. 102; *Proctor v. McCall*, 2 Bail. 298; S. C., 23 Am. Dec. 135; *Puckett v. State*, 1 Sneed, 356; *Shoven v. McMackin*, 9 Lea, 601; S. C., 42 Am. Rep. 680; *Primm v. Stewart*, 7 Tex. 178. In discussing this subject, Shaw, C. J., delivering the opinion of the court in *Loring v. Steineman*, 1 Met. 211, said: "This presumption is greatly strengthened when the departure of an individual was from his native place, the seat of his ancestors, and the home of his brothers and sisters and family connections; and still further when it was to enter upon the perilous employment of a seafaring life, and when he was not heard of by those who would be most likely to know of him."

But the law raises no presumption as to the precise time of the death of an absentee who has not been heard of by those who would naturally have heard of him had he been alive. The presumption arises only when the term of seven years is complete. His death before the expiration of that period is a fact that must be proved: *Nepean v. Doe*, 2 Mees. & W. 894; *In re Lewis's Trusts*, L. R. 11 Eq. 236; *Regina v. Lumley*, L. R. 1 C. C. 196; *In re Phené's Trust*, L. R. 5 Ch. 139; *Davie v. Briggs*, 97 U. S. 628; *In re Hall*, 1 Wall. Jr. 85; *Montgomery v. Bevans*, 1 Saw. 653; *Smith v. Smith*, 49 Ala. 156; *Doe v. Flanagan*, 1 Ga. 538; *Whiting v. Nicholl*, 46 Ill. 230; *Spurr v. Trimble*, 1 A. K. Marsh. 278; *Loring v. Steineman*, 1 Met. 204; *Flynn v. Coffee*, 12 Allen, 133; *Hancock v. American L. I. Co.*, 62 Mo. 26; *Smith v. Knowlton*, 11 N. H. 191; *Stouvenel v. Stephens*, 2 Daly, 319; *McCartee v. Camel*, 1 Barb. Ch. 456; *State v. Moore*, 11 Ired. 160; S. C., 53 Am. Dec. 401; *Spencer v. Roper*, 13 Ired. 333; *Burr v. Sim*, 4 Whart. 150; S. C., 33 Am. Dec. 50; *Holmes v. Johnson*, 42 Pa. St. 159; *Hershey v. Shenk*, 58 Id. 382; *Conley v. Holloway*, 22 S. C. 380; Best on Presumptions, sec. 140. Wagner, J., in delivering the opinion of the court in *Hancock v. American L. I. Co.*, 62 Mo.

30, said: "Where a party has been absent seven years without having been heard of, the only presumption then arising is, that he is dead; there is none as to the time of his death, as to whether he died at the beginning or at the end of any particular period during those seven years. If it be important to any one to establish the precise time of such person's death, he must do so by evidence of some sort, to be laid before the jury for that purpose, beyond the mere lapse of seven years."

This period of seven years was adopted by the courts in analogy to the statute 1 Jac. I., c. 11, sec. 2, which exempts from the penalties of bigamy any person whose husband or wife shall be continually remaining beyond the seas by the space of seven years together, or whose husband or wife shall absent himself or herself, the one from the other, by the space of seven years together, in any parts within the king's dominions, the one of them not knowing the other to be living within that time; and the statute 19 Car. II., c. 6, sec. 2, respecting the lives of persons in leases, who shall be absent for more than seven years, and who are thereupon to be deemed naturally dead: *Lawson on Presumptive Evidence*, 202; *Best on Presumptions*, sec. 140; *Eagle's Case*, 3 Abb. Pr. 218. The mere fact of a person's absence from a particular place for seven years does not of itself justify the presumption that he is dead. To justify such presumption, it must be shown that the place from which he has been so absent was his residence or usual place of resort, and that he has not been heard of by those who would naturally have heard of him if he were alive. And if he had a fixed residence abroad, due inquiry must have been made at the place of such residence in order to justify a presumption of his death: *Doe v. Andrews*, 15 Ad. & E., N. S., 756; *Seneca-derriffer v. Pacific M. L. I. Co.*, 19 Fed. Rep. 68; *Smith v. Smith*, 49 Ala. 156; *Spurr v. Trimble*, 1 A. K. Marsh. 278; *Grey v. McDowell*, 6 Bush, 482; *Stevens v. McNamara*, 36 Me. 176; S. C., 58 Am. Dec. 740; *Stinchfield v. Emerson*, 52 Me. 465; S. C., 83 Am. Dec. 524; *Wentworth v. Wentworth*, 71 Me. 72; *Commonwealth v. Thompson*, 11 Allen, 26; *Bailey v. Bailey*, 36 Mich. 181; *Thomas v. Thomas*, 16 Neb. 553; *Brown v. Jewett*, 18 N. H. 230; *McCartee v. Camel*, 1 Barb. Ch. 455; *University v. Harrison*, 90 N. C. 385.

A presumption may arise that the death of an absent person took place before the expiration of seven years from the time of his having been last heard from, where such facts and circumstances are shown as will justify the presumption, such as the fact that he was, when last heard of, in a desperate state of health, that he was known to have been exposed to some specific and extraordinary peril, that he embarked upon a vessel that has not been since heard from, although long overdue, and that inquiries have been made without avail at her port of departure, and also at her port of destination, or that the habits or necessities of the absentee were such as to make it certain that he would have returned had he been alive. These and the like circumstances will justify the shortening of the period within which his death may be presumed to have taken place: *Webster v. Birchmore*, 13 Ves. 362; *Danby v. Danby*, 5 Jur., N. S., 54; *Watson v. Maxwell*, 1 Stark. 121; *In re Hutton*, 1 Curt. 595; *In re Cook*, 1 R. 5 Eq. 240; *Labin v. Labin*, 34 Beav. 443; *In the Goods of Main*, 1 Swab. & T. 11; *In re Beames's Trusts*, L. R. 7 Eq. 498; *Hickman v. Upsall*, L. R. 4 Ch. Div. 147; *Garden v. Garden*, 2 Houst. 574; *Tisdale v. Connecticut M. I. Co.*, 26 Iowa, 170; *White v. Mann*, 26 Me. 361; *Learned v. Corley*, 43 Miss. 687; *Lancaster v. Washington L. I. Co.*, 62 Mo. 121; *Cox v. Ellsworth*, 18 Neb. 664; S. C., 53 Am. Rep. 827; *Sheldon v. Ferris*, 45 Barb. 124; *Merritt v. Thompson*, 1 Hilt. 550; *Stovenel v. Stephens*, 2 Daly, 319; *Eagle's Case*, 3 Abb. Pr. 218; *Gibbes v. Vin-*

cent, 11 Rich. 323. Cobb, C. J., in delivering the opinion of the court in *Cox v. Ellsworth*, 18 Neb. 664, S. C., 53 Am. Rep. 827, said: "It seems to be the settled rule, both in England and in this country, that seven years is the period at which the presumption of continued life ceases. But this period may be shortened by the proof of such facts and circumstances connected with the person whose life is the subject of the inquiry as, when submitted to the test of reason and experience, would force the conviction of death within a shorter period." And Bradford, S., in delivering the opinion of the court in *Eagle's Case*, 3 Abb. Pr. 220, said: "When a party has been absent seven years since any intelligence of him, he is in contemplation of law presumed to be dead. This length of time may be abridged, and the presumption be applied earlier by proof of special circumstances tending to show the death within a certain period; for example, that at the last accounts the person was dangerously ill, or in a weak state of health; was exposed to great perils of disease or accident; that he embarked on board of a vessel which has not since been heard from, though the length of the usual voyage has long elapsed. In such cases it is to be determined as a question of fact depending on evidence when death probably occurred, and if the circumstances known are sufficient to authorize such a conclusion, the decease may be placed at a time short of the seven years, as the proof may indicate. But when there are no facts material to the solution of the question, except simply absence without being heard of, then at the end of seven years the law presumes death."

But where it is improbable that the absentee, even if alive, would have been heard of or would have communicated with his residence or former place of resort, the presumption of his death will not arise from his absence for seven years: *Lawson on Presumptive Evidence*, 237; *Bowden v. Henderson*, 2 Smale & G. 300; *Watson v. England*, 14 Sim. 28; *McMahon v. McElroy*, 1 R. 5 Eq. 1; *Milham's Trust*, 15 Beav. 507; *Lakin v. Lakin*, 34 Id. 443. And the presumption of an absentee's death after seven years is rebutted by evidence that he was seen or heard of within that time: *Smith v. Smith*, 49 Ala. 156; *O'Kelly v. Felker*, 71 Ga. 775. And to rebut the presumption of death in such a case, evidence is admissible to show that the person has been heard of as living within that time, although by others than members of his family: *Flynn v. Coffee*, 12 Allen, 133.

In collateral proceedings it is conclusively presumed that a person is dead when it appears that letters of administration have been granted on his estate by the proper tribunal. The grant of administration is *prima facie* evidence of the death of the intestate: *Hurlburt v. Van Wormer*, 14 Fed. Rep. 709; *Jenkins v. Peckinpaugh*, 40 Ind. 133; *French v. Frasier*, 7 J. J. Marsh. 425; *Peterkin v. Inloes*, 4 Md. 175; *Lancaster v. Washington L. I. Co.*, 62 Mo. 121. So the suggestion of the death of a plaintiff in the record and an order to make his devisees parties is *prima facie* evidence of his death: *Stebbins v. Duncan*, 108 U. S. 32. But when both husband and wife perish in the same calamity, no presumption of survivorship of the wife arises from the fact that an order of a probate court granting letters of administration upon her estate recites that she was "the surviving wife" of her husband: *Sanders v. Simcich*, 65 Cal. 50.

Where two or more persons perish in the same disaster, the common law recognizes no artificial presumption as to which of them died first: Best on Presumptions, sec. 144; *Lawson on Presumptive Evidence*, 240; *Mason v. Mason*, 1 Mer. 308; *Wollaston v. Berkeley*, L. R. 2 Ch. Div. 213; *Satterthwaite v. Powell*, 1 Curt. 705; *Underwood v. Wing*, 4 De Gex, M. & G. 633; *Wing*

v. Angross, 8 H. L. Cas. 183; *Kansas Pac. R. R. Co. v. Miller*, 2 Col. 442; *Russell v. Hallett*, 23 Kan. 276; *Coye v. Leach*, 8 Met. 371; *Newell v. Nichols*, 75 N. Y. 78; *Moehring v. Mitchell*, 1 Barb. Ch. 264; *In re Ridgway*, 4 Redf. 226.

WHEN COURT SHOULD DIRECT VERDICT: See *Devo v. New York Cent. R. R. Co.*, 88 Am. Dec. 418, note 427.

SCHAFERMAN v. O'BRIEN.

[28 MARYLAND, 565.]

WHERE JUDGMENT IS CONFERRED BY FRAUDULENT GRANTOR BEFORE CLAIM IS BARRED by the statute of limitations, the original cause of action is merged in the judgment, and the plea of the statute cannot avail against it.

WHERE GRANTEE OF LAND MAKES CONVEYANCE THEREOF PENDING SUIT against him to set aside the deed to him as fraudulent, the persons to whom he conveys need not be made parties to the suit.

GRANTEES CLAIMING LAND UNDER PARTIES TO SUIT, or any of them, are in no better condition than those under whom they claim.

STATUTE OF HENRY VIII., CHAPTER 9, AGAINST CHAMPERTY, IS NOW OBSOLETE, in a great measure, in Maryland. The ancient policy on this subject was founded upon a state of society which does not exist in this country.

BONA FIDE ASSIGNEE OF CHOSE IN ACTION HAD PECULIARLY EQUITABLE remedy, before act of 1829, chapter 27, and that act has enlarged his powers.

NECESSITY OF LIEN BY JUDGMENT, OR OTHERWISE, AGAINST PROPERTY, as preliminary to equitable relief, is obviated since the act of 1835, chapter 390.

ASSIGNEE OF JUDGMENT ENTITLED TO COLLECT from the judgment debtor his demand, existing as an original cause of action antecedent to a deed from such debtor to a third person, has the right to pursue any property belonging to the debtor, liable therefor, unless *bona fide* transferred to a purchaser for a valuable consideration. If the deed is an honest transaction, it will afford protection to the grantee therein against the claim which existed antecedent thereto, but upon which judgment was not rendered until afterwards; but if the deed be the result of fraudulent collusion between the grantor and the grantee to hinder and defeat the creditors of the former, it cannot receive the countenance of a court of equity.

DEED HAVING ITS ORIGIN IN FRAUD IS NULLITY so far as the creditors of the grantor are concerned, however solemn it may be in its formalities.

BILL in equity filed by O'Brien to set aside a deed from Leiman to Schaferman, dated September 30, 1852. The bill alleged that Leiman, being indebted to one Pendleton, on September 18, 1852, was sued by him on the 25th of October, 1852, and a judgment recovered against him on the 9th of June, 1853, which judgment complainant bought on December 1, 1857. The bill charged that the deed of September 30, 1852, was fraudulent and void, having been made without con-

sideration to defraud the creditors of Leiman. The court below made a decree setting aside the deed. The other facts appear from the opinion.

William H. Dawson and George H. Williams, for the appellant.

P. McLaughlin, for the appellees.

By Court, STEWART, J. Several preliminary propositions discussed by the respective counsel in this case will be disposed of before we determine the main question,—the character and purport of the deed of the 30th of September, 1852, from Leiman to Schaferman. The plea of limitations, having been interposed, was urged against the demand of the complainant, but we think it is not applicable under the circumstances of this case. In *McDowell v. Goldsmith*, 24 Md. 214, it was decided that the confession of a judgment by a fraudulent grantor or his administrator, after the execution of the deed, would not defeat the plea of the statute of limitations made by the grantee. But in that case the claim was actually barred before the judgment was confessed, and it was held that the grantor could not voluntarily waive or defeat any right of the grantee. In this case the judgment against the grantor was recovered before the claim had been barred by the statute,—there was no waiver of any right or defense to the prejudice of the grantee. The original cause of action was merged in the judgment, and the plea of limitations cannot avail. The same point was expressly decided in *Williams v. Banks*, 11 Id. 198, where a judgment was confessed after the deed was executed, but before limitations had barred the note upon which the judgment was confessed: See Glenn's claim, *Williams v. Banks*, 11 Id. 234; see also *Williams v. Banks*, 19 Id. 22, etc. It has also been objected that Schaferman having conveyed the property mentioned in the deed to other persons since the pendency of these proceedings, they ought to have been made parties. If such a suggested fact could delay the cause, it might have become interminable. Grantees claiming the land under parties to the suit, or any of them by title derived *pendente lite*, are in no better condition than those under whom they claim: *Tongue v. Morton*, 6 Har. & J. 23.

It has also been insisted that the complainant, having purchased the judgment against Leiman subsequent to the deed, has no standing in court,—that such a purchase savors of champerty, is in violation of the statute of Henry VIII., c. 9,

recognized in Kilty's report as in force in this state. This statute prohibits, under penalties, the buying or selling of any pretended right to land, unless the vendor is in actual possession of the same, or of the reversion or remainder. "The ancient policy which prohibited the sale of pretended titles as an act of maintenance was founded upon a state of society which does not exist in this country": 4 Kent's Com. 526.

The statute of Henry VIII., c. 9, is not rigidly enforced in this country: *Sedgwick v. Stanton*, 14 N. Y. 289. "It will have been perceived that the subject of the assignment of rights of action as tending to the common-law offenses of champerty and maintenance is here left in a state of considerable uncertainty." The subject was examined in a late case: *Danforth v. Streeter*, 28 Vt. 490, and the following conclusion reached: "That the *bona fide* purchaser of a bond or other chose in action which is represented to be due, and which the purchaser believes to be due, may sue upon the same and not incur censure from the law; and that all contracts founded upon any such consideration are valid. The same is true of any aid one may render another in a suit by way of money or advice, or other lawful assistance, if done under a *bona fide* belief in the justice of the case. It was upon these grounds that we ventured to suggest that the common-law notion of maintenance, as applicable to the assignments of rights of action, had become practically obsolete": Story's Eq. Jur., sec. 1057. "Maintenance now means, where a man improperly, and for the purpose of stirring up litigation and strife, encourages others either to bring actions or to make defenses which they have no right to make": *Findon v. Parker*, 11 Mees. & W. 679, 682, referred to in 4 Kent's Com. 531.

We are not aware of any case in the judicial history of this state where the provisions of the statute of Henry VIII. have been enforced,—without meaning to assert that there might not be such exceptionable conduct savoring of champerty and maintenance as to be punishable; yet there can be no doubt that this statute is, in a great measure, now obsolete. Before the act of 1829, c. 57, the *bona fide* assignee of a chose in action was considered as having peculiarly an equitable remedy, and certainly that statute enlarges his powers. It gives to the assignee of a judgment, specialty, or other chose in action the authority to sue in any court of law or equity, reserving to the defendant all such legal or equitable defenses as might be maintained against the assignor. The necessity of a lien by

a judgment, or otherwise, against the property, as preliminary to equitable relief, is obviated since the act of 1835, c. 380: *Richards v. Swan*, 7 Gill, 377. In the case before us judgment has been obtained against Leiman, the grantor in the deed. The complainant, as assignee, being entitled to collect from Leiman this demand, existing as an original cause of action antecedent to the deed in question, has the right to pursue any property for the payment of the same, belonging to Leiman, liable therefor, unless *bona fide* transferred to a purchaser for a valuable consideration.

The deed of the 30th of September, 1852, if it were an honest transaction between the parties, would afford protection to the grantee therein, against the claim which existed antecedent thereto, as the judgment thereon was not rendered until afterwards. On the contrary, if the deed was the result of fraudulent collusion between Leiman and Schafferman, to hinder and defeat the creditors of Leiman, it cannot receive the countenance of a court of equity. However solemn the instrument in its formalities, if it had its origin in fraud it is a nullity, so far as the creditors of Leiman are concerned. "There is no ascertained rule of law which determines what acts or declarations of a party shall, in all cases, be requisite to establish fraud; each case must depend upon its own circumstances": *Richards v. Swan*, 7 Gill, 369. "Badges of fraud vary, according to the capacity of the party and the end to be attained." "We must look for the motives and designs of the parties, to the circumstances surrounding the transactions, and every fact, however trivial, which can throw light upon the subject": *Feigley v. Feigley*, 7 Md. 562 [61 Am. Dec. 375]. Where a bill was filed to set aside a deed as fraudulent against creditors, Judge Nelson of the supreme court, who delivered the opinion affirming the judgment of the circuit court, vacating the deed in that case relied very much upon the unsatisfactory evidence, in respect to the payment of the consideration specified in the deed. "This proof," he said, "was vital in order to uphold a deed in other respects surrounded with suspicion. The evidence was in their possession." He referred also to the "continuance of the vendor in the possession and full enjoyment of the premises, the same after the deed as before, and absence of interest manifested by the vendee as circumstances not satisfactorily explained."

"The conveyance was made to a brother." "The vendee seems to have taken no part in the management of the prop-

erty." "No proof was given by the defendants in respect to the payment of the consideration": *Collam v. Statham*, 23 How. 479. That case in several of its features was not unlike this. The defendant, Schaferman, in his first answer, states "he will specify, if necessary, how the consideration for the said conveyance was paid, but he is advised that it is a matter of testimony"; but his promise to furnish evidence upon that subject was not redeemed. His deed was impeached, and upon that point he was specially interrogated in the bill, and if he knew anything of the matter, he must have been cognizant of that; but it is left to conjecture, no proof having been adduced. Schaferman conveyed back to Leiman the same property in the year 1857, but the instrument is withheld from record, and does not come to the light for a long time. When this suit was instituted, although he had thus reconveyed to Leiman, he executes another conveyance to other parties, and from that fact suggests a question, if such conveyance does not affect the past proceedings against him, but makes no disclosure of the anterior deed to Leiman. After the trial at law on the note is instituted, but before judgment, this deed of September, 1852, from Leiman to Schaferman is executed, and soon afterwards Leiman applies for the benefit of the insolvent laws, returning no assets. The rents of the property are quite regularly collected by Leiman or his wife, although Schaferman lived in the immediate vicinity, and there is no testimony of their ever being paid over to Schaferman. Leiman paid the ground-rent after the deed; Schaferman gave receipts for rent, although there is no proof he received any.

Leiman contracts for a sublease to Henry Pfau, and Schaferman executed the same. The property was mortgaged by Schaferman to secure a debt due by Leiman. Schaferman said the property belonged to Leiman, and that it only stood in his name. There is no proof that Schaferman had sufficient means to pay the amount of the consideration, or that Leiman owed him considerably. Schaferman and Lieman were brothers-in-law.

In the absence of any explanation as to the payment of the purchase-money, except the presumption in the deed, which is only *prima facie*, all the circumstances referred to are *indicia* of fraud and collusion, and cannot be reconciled with plain and straightforward dealing. If the transaction had been *bona fide*, certainly the grantee had the opportunity afforded

to relieve it of the imputation of fraudulent arrangement to defeat the creditors of Leiman. Failing totally to do so when the issue is made, the developments, exposed by the testimony in the cause, must have their irresistible solution adverse to the integrity of the deed as a righteous and genuine contract. Unexplained by any testimony throughout the record, they permit us to come to no other conclusion than that they are beyond the power of satisfactory explanation consistent with any theory of fair and honest transfer of the property. We are satisfied the decree of the court below ought to be affirmed.

Decree affirmed and cause remanded.

GRANTEE OF FRAUDULENT GRANTOR, WHEN STATUTE OF LIMITATIONS RUNS IN FAVOR OF: See *Munson v. Hollowell*, 84 Am. Dec. 582, note 591; *McDowell v. Goldsmith*, 61 Id. 305, note 318.

BONA FIDE PURCHASER FROM FRAUDULENT GRANTOR, WHEN PROTECTED: See *Sargent v. Sturm*, 83 Am. Dec. 118, note 122, where other cases are collected.

DEED FRAUDULENT AB INITIO IS VOID FOR ALL PURPOSES: See *Goodwin v. Hammond*, 73 Am. Dec. 574, note 575.

CONVEYANCE TO DELAY, HINDER, OR DEFRAUD CREDITORS IS VOID: See *Robinson v. Holt*, 75 Am. Dec. 233, note 236, where other cases are collected; *Knight v. Packer*, 72 Id. 388, note 392.

LIT PENDENS: See *Shelton v. Johnson*, 70 Am. Dec. 255, note 269, where other cases are collected.

CHAMPERTY AND MAINTENANCE: See *Pratt v. Pierce*, 58 Am. Dec. 758, note 761; *Weakly v. Hall*, 42 Id. 194, note 197, where other cases are collected.

THE PRINCIPAL CASE IS CITED IN *Sanborn v. Lang*, 41 Md. 116, to the point that the consideration of a deed, if any existed, must have been known to the parties thereto. It is also referred to in *Weaver v. Leiman*, 52 Id. 711, a case growing out of the same transactions that are involved in the principal case.

BOONE v. PURNELL.

[25 MARYLAND, 607.]

EVIDENCE BY WITNESS OF REPUTATION OF MARRIAGE IS ADMISSIBLE so long as it appears to be a general reputation; but as soon as it appears, on cross-examination or otherwise, that the witness is speaking from information given him by some individual, even of the existence of a general reputation, such evidence is merely hearsay, and as such is inadmissible.

GENERAL REPUTATION IN REGARD TO MARRIAGE MAY BE PROVED by the testimony of a witness speaking from his own knowledge of the existence of such general reputation, except in cases of adultery or bigamy, in which strict proof is required. And such evidence is also admissible in disproof of marriage. It is admissible as a fact to show whether or not a marriage exists.

PARTY WHO HAS OFFERED TESTIMONY WHICH COURT HAS ADMITTED AGAINST OBJECTION by the opposite party, may, afterwards and before instructions are asked for, and before the cause has been argued by counsel, ask to have the same withdrawn from the consideration of the jury, and the court may allow its withdrawal.

EJECTMENT for a lot of land, brought by the appellants, claiming as the descendants of John C. B. Boone, who died in 1824, having, as they contended, been twice married, and having had two children by his first marriage to Betsey Parlett, Stephen and Eleanor, the latter of whom died childless. The plaintiffs are the grandchildren of Stephen. The defendant claimed that Boone was never married to Betsey Parlett; that he had but one legitimate child, Prudence, through whose children the defendant derived his title. The only question in the case was the legitimacy of said Stephen and Eleanor. The testimony objected to by the appellants in the second exception was in the deposition of Jemima Guineavan, and is in these words: "She heard in the neighborhood that William Parlett, whom she has seen, was a son of the mother of said Stephen and Eleanor; that it was the reputation of the neighborhood that the above J. C. B. Boone was the father of said Stephen and Eleanor Parlett. But it was also the belief and report of the neighborhood that said Boone and the mother of said Stephen and Eleanor, whose name she has heard in the neighborhood, was Betsey Parlett, were not married." The testimony objected to by the appellants in the third exception was in the deposition of Sarah Blufford, and is as follows: "That said John C. B. Boone never was married until he married Betsey Hale. Betsey Dew and John C. B. Boone never were married, to her knowledge and belief; it was the general reputation of the neighborhood that they lived together illicitly." The following are the prayers of the defendant, referred to in the opinion: "1. That the fact that John C. B. Boone cohabited with Betsey Parlett, and that the offspring of such cohabitation were recognized by him to be his children, and provided for in his will, and were described therein by the surname of Boone, and assumed and passed by that name, and the declarations of said Boone, and the other facts and circumstances offered in evidence on the part of the plaintiff as tending to prove a marriage of said John C. B. Boone and Betsey Parlett, if the jury believe the witnesses testifying thereto, is evidence sufficient of itself to raise a presumption of the intermarriage of said parties; but if the jury further

find that at the time of the said cohabitation the general reputation of the neighborhood in which they lived was that they were not married, but were living together illicitly, and that the general reputation within the family of the said Boone, then and subsequently, was that their intercourse was so illicit, and that the said John C. B. Boone, after said cohabitation, repeatedly declared that he had never been married to the said Betsey Parlett, then the facts and circumstances taken together afford evidence tending to rebut such presumption of marriage; and if the jury from the whole evidence in the cause find that the said John C. B. Boone and Betsey Parlett were never married, the plaintiff will not be entitled to recover.

2. That if they find that previously to the intercourse between the said John C. B. Boone and Betsey, the mother of the said Stephen and Eleanor, of which the said Stephen and Eleanor were the fruit, the said Betsey was married to one Parlett, and that the said Parlett was not then dead, but in life, and that he survived the time when the marriage of the said Boone and Betsey Parlett is alleged and claimed, on the part of the plaintiff, to have taken place, then, even if the jury should find a marriage in the lifetime of her said former husband, Parlett, such marriage would be invalid and void." The prayers of the plaintiff referred to in the opinion are as follows:

"4. If the jury believe from the evidence that John C. B. Boone and the mother of Stephen Boone lived together and cohabited, and that said Stephen was an offspring of such cohabitation, and that the said John C. B. Boone acknowledged said Stephen as his son, and in his last will and testament gave him the family name of Boone, and provided for him as his son, and that the said mother died before said John C. B. Boone, and that after the death of said mother the said John C. B. Boone declared that his wife, the mother of said Stephen, was dead, and pointed out the spot in the family burial-ground of the Boone family where she was buried, and expressed a wish to be buried by her side, and was buried by her side in conformity with his wish, as aforesaid, and that the said Stephen was also there buried by the side of his said parents, and that a long period has elapsed since the death of the said Stephen and his said parents, they must find that the said Stephen was a legitimate son of the said John C. B. Boone, unless there is evidence to show that there is no reasonable possibility of a marriage ever having taken place between the said John C. B. Boone and the said mother, either publicly or privately, at any

place, either in the state of Maryland or beyond the limits of the state of Maryland, at any period before the death of the said mother. 8. If the jury believe from the evidence that the mother of Stephen Boone lived with John C. B. Boone and cohabited with him, and that said Stephen was an offspring of such cohabitation, and that the said John acknowledged said Stephen as his son, and in his last will and testament declared him to be his son and gave him the family name of Boone, and that the said Stephen and his parents died many years ago, they must find that the legitimacy of the said Stephen is established by competent proof, and that the defendant has produced no evidence in this cause legally sufficient to overthrow such proof of legitimacy. 1. If the jury believe from the evidence that John C. B. Boone and the mother of Stephen Boone lived together and cohabited, and that said Stephen was an offspring of such cohabitation, and that the said John C. B. Boone acknowledged said Stephen to be his son, and called him by the family name of Boone, they must find that said Stephen was a legitimate son of said John C. B. Boone, unless they find satisfactory proof to the contrary. 2. If the jury believe from the evidence that John C. B. Boone cohabited with the mother of Stephen Boone, and that said Stephen was an offspring of such cohabitation, and that the said John C. B. Boone acknowledged said Stephen as his son, and always treated him as such, and that the said Stephen lived with said John C. B. Boone, and was brought up by him as if he were his legitimate son, and that the said John C. B. Boone in his last will and testament expressly named said Stephen as his son, and gave him the family name of Boone, and provided for him by bestowing upon him a large portion of his property, they must find that those acts of the said John C. B. Boone amounted to a daily assertion that the said Stephen was his legitimate son, and they must presume that he was such unless they find stronger proof to the contrary." The third prayer is the same as the fourth, already given above, down to and including the word "unless," after which it proceeds, "they find strong, distinct, satisfactory, and conclusive evidence to establish the fact that the said John C. B. Boone never was married to the mother of the said Stephen." "7. If the jury believe from the evidence that John C. B. Boone cohabited with the mother of Stephen Boone, and that said Stephen was an offspring of such cohabitation, and that the said John C. B. Boone recognized said Stephen as his son,

and in his last will and testament called him his son, and gave him the family name of Boone, and that the said Stephen and his said parents died many years ago, such cohabitation and recognition, as aforesaid, offered legally sufficient proof that the said John was married to the said mother, unless they find conclusive proof to the contrary, and that no declaration or declarations of said John that he never was married to the said mother can have any legal effect as evidence against the proof of marriage as aforesaid, unless it has been shown that such declaration or declarations were solemnly and deliberately made. 9. If the jury believe from the evidence that the land claimed in the declaration in this action is a portion of the land of which John C. B. Boone died seised, and that Stephen Boone, Eleanor Burke, and Prudence Chamberlaine were his legitimate children, and that the plaintiff's lessors are children and grandchildren of said Stephen, and that John C. R. B. B. Chamberlaine and Elizabeth P. Boone are the children of the said Prudence, and that some time after the death of the said John C. B. Boone, the said John C. R. B. B. Chamberlaine and the said Elizabeth P. Boone claimed possession of the said land as heirs of said John C. B. Boone, or that it was so claimed for them by their guardian, they must find that no such possession of said Chamberlaine and Elizabeth, and those claiming for or under them could be adverse to the title of the plaintiff's lessors to an undivided portion of said land as heirs of said John C. B. Boone, until there had been an ouster of said plaintiff's lessors by the said Chamberlaine and Elizabeth, or those claiming for or under them, and a lapse of twenty years subsequent to such ouster and before the commencement of this suit, and that no reception of the profits or deeds of conveyance of said lands by the said Chamberlaine and Elizabeth, or by those claiming for or under them, would amount to an ouster of the plaintiff's lessors, and that such ouster would only be by an expulsion of the plaintiff's lessors from said land, a refusal to allow them to enter thereon, or an open, notorious, and uniform denial of their title to an undivided portion thereof, known to the plaintiff's lessors twenty years before the commencement of this suit, and the burden of proving such an ouster and knowledge thereof, as aforesaid, is on the defendant, and in the absence of proof of such ouster, and knowledge thereof by the plaintiff's lessors twenty years before the commencement of this suit, the plaintiff is entitled to receive an undivided portion of said land as

claimed in the declaration. 10. If the jury believe from the evidence that the land described and claimed in the declaration in this cause is a portion of the land of which John C. B. Boone died seised, and that the plaintiff's lessors are legitimate descendants and heirs at law of said John, and that John C. R. B. B. Chamberlaine and Elizabeth P. Boone are also heirs of the said John, and that some time after the death of said John the said Chamberlaine and Elizabeth claimed possession of said land as heirs of said John, but find no evidence to show that the land described and claimed in the declaration has been held by continuous inclosure for twenty years before the commencement of this suit, the right of entry of said plaintiff's lessors has not been barred by the operation of the statute of limitations. 11. If the jury believe from the evidence that John C. B. Boone died seised of the land described and claimed in the declaration in this cause, and that the plaintiff's lessors are legitimate descendants and heirs at law of said John, and that after the death of said John one John C. R. B. B. Chamberlaine and one Elizabeth P. Boone claimed and held possession of said land, claiming the same as heirs at law of said John, they must find that the said Chamberlaine and Elizabeth could not hold said land adversely to the title of the plaintiff's lessors to one undivided portion thereof until after an ouster of said plaintiff's lessors, and subsequent possession for twenty years; and if the jury believe that there was such an ouster, but believe that at the time of the said ouster any of the plaintiff's lessors were married women and continued under coverture until commencement of this suit, they must find that the right of entry as respects the undivided portion in said land of said married women, continuing under coverture as aforesaid, has not been barred by adverse possession. 12. If the jury believe from the evidence that the land described and claimed in the declaration in this cause is a portion of the land of which John C. B. Boone died seised in the year 1824, and that the plaintiff's lessors are legitimate descendants and heirs at law of said John C. B. Boone, and that at some period after the death of said John C. B. Boone, one John C. R. B. B. Chamberlaine, and one Elizabeth P. Chamberlaine, now Elizabeth P. Boone, claimed said land of which said John C. B. Boone died seised as aforesaid, as his heirs, in the year 1835, divided said land between them by deeds of partition, such deeds of partition were null and void, so far as the undivided portion

of the plaintiff's lessors in said land was concerned; and if they find that afterwards said Elizabeth P., and her husband, Samuel Boone, and said John C. R. B. B. Chamberlaine and wife conveyed by deed or deeds said land to Grafton L. Dulaney, such deed or deeds were also null and void so far as the undivided portion of the plaintiff's lessors was concerned; and if the jury find that the defendant holds and claims the land sued for in this action by virtue of subsequent conveyances connecting his title to said land to the title of said Elizabeth and John C. R. B. B. Chamberlaine by the deeds aforesaid, then the plaintiff is entitled to recover one undivided portion of said land as claimed in the declaration. 13. Upon the evidence offered in this cause the jury cannot find that the right of entry of the plaintiff's lessors has been barred by the operation of the statute of limitation; and if the jury believe from the evidence that the plaintiff's lessors are legitimate descendants and heirs at law of John C. B. Boone, and that said Boone died seised of the land described and claimed in the declaration, the plaintiff is entitled to recover an undivided portion of said land." Other facts appear from the opinion.

R. R. Boorman, for the appellants.

Arthur W. Machen and Richard J. Gittings, for the appellee.

By Court, BRENT, J. Although the record in this case is very voluminous, and the number of exceptions taken and prayers asked in the court below is unusually large, there is in reality, as was conceded in the argument on both sides, but one important question submitted for the decision of this court,—Is general reputation admissible evidence in regard to marriage? This kind of evidence is not to be confounded with hearsay evidence. Though generally treated of by the text-writers under that head, and though composed of the speech of third persons not under oath, it is considered original evidence, and not hearsay; the immediate subject of inquiry being the concurrence of many voices, which raises the presumption that the fact in which they concur is true: 1 Taylor's Evidence, 508. It must rest upon competent knowledge, and is therefore admitted in regard to matters only of public or general interest, the law presuming that upon such matters the public is enabled to speak knowingly and truly. In Hubback's Succession, 243, it is said: "Reputation of marriage may be proved by the testimony of living witnesses speaking to the existence of that reputation." In the case of

Evans v. Morgan, 2 Comp. & J. 453, where the question of marriage was directly in issue, the testimony was held to be admissible. In reviewing this case, Hubback properly states the ground of its admissibility where marriage is the subject of inquiry. He says, on page 244: "It appears from this case, and from the general tenor of the authorities, that reputation of marriage, unlike that of other matters of pedigree, may proceed from persons who are not members of the family. The reason of the distinction is to be found in the public interest, which is taken in the question of the existence of a marriage between two parties; the propriety of visiting or otherwise treating them in society as husband and wife, the liability of the man for the debts of the woman, the power of the latter to act *suo jure*, and their competency to enter into new matrimonial engagements, being matters which interest not their relations alone, but every one who, by coming in contact with them, may have occasion to regulate his conduct accordingly as he understands them to be married or not." The admissibility of this evidence is also recognized in 2 Stark. Ev. 843, 844, and in 3 Phill. Ev. 598. In 1 Greenl. Ev., sec. 107, referred to by the counsel for the appellants, the language used by the author is not understood as adverse to its admissibility in a case like the present. His doubt is expressed in regard to "ordinary cases, where pedigree is not in question." In the recent and very able work of Taylor on the Law of Evidence, the testimony is regarded as proper, and the ground of its admissibility is stated with much force and clearness. In section 517, volume 1, it is said: "Thus it has frequently been decided that, except in petitions for damages by reason of adultery and in indictments for bigamy, where strict proof of marriage is required, general reputation is admissible to establish the fact of parties being married. In most of the cases, the marriage has been proved by evidence of certain specific facts, such as the parties being received into society as man and wife, being visited by respectable families in the neighborhood, attending church and public places together, and otherwise demeaning themselves in public, and addressing each other as persons actually married. Still, though some of these circumstances are receivable, as amounting to acts of admission by the parties themselves, those which are merely evidence of the treatment of the parties by third persons cannot be admissible on any principle that would not equally include the declarations of strangers.

The acts, like the words, merely show the opinion entertained by persons not called as witnesses; and though it may be said that what a person does is usually better evidence of his opinion than what he says, yet this is an observation which goes rather to the weight than the admissibility of the evidence. Accordingly, evidence of general reputation in the neighborhood, even when unsupported by facts, will be receivable in proof of marriage." In *Doe v. Fleming*, 4 Bing. 266, the evidence was admitted in an action of ejectment by a party seeking to recover as heir at law. Park, J., remarked: "The general rule is, that reputation is sufficient evidence of marriage; and a party who seeks to impugn a principle so well established ought, at least, to furnish cases in support of his position"; and Best, C. J., added, "The rule has never been doubted." In *Goodman v. Goodman*, 4 Jur., N. S., 1224 (1858), the principle, so emphatically announced in this case, is fully recognized and affirmed by the vice-chancellor. He says: "On the question of reputation of marriage, the law was well settled in the case of *Doe v. Fleming*, 4 Bing. 266." In *Banert v. Day*, 3 Wash. C. C. 243, the evidence was admitted, and it was held that it was no objection that the witness, who deposed to the general reputation, was not a member of the family. The doctrine is also recognized in *Sellman v. Bowen*, 8 Gill & J. 54 [29 Am. Dec. 524]; *Ex parte Taylor*, 9 Paige, 617; *Clayton v. Wardell*, 4 N. Y. 230. In *Spedden v. Patrick*, 2 Swab. & T. 170 (Jur. Dig., 1861, p. 83), the rule is correctly laid down, and as there stated is in accordance with our own views. It is there said that "evidence by a witness of reputation of marriage is admissible so long as it appears to be a general reputation; so soon as it appears, however, on cross-examination or otherwise, that the witness is speaking from information given him by some individual, even of the existence of a general reputation, such evidence is merely hearsay, and as such is inadmissible."

The cases relied upon by the appellants' counsel have been carefully examined, and they are not in conflict with the authorities above cited. They are either cases in which the question of marriage is not directly in issue, or in which the proof offered was inadmissible upon the ground of its being merely hearsay. In *Stein v. Bowman*, 13 Pet. 209, so strongly urged in the argument on behalf of the appellants, the testimony rejected by the court was that of a witness who was introduced to prove that he had heard, in Hanover, Germany,

"from many old persons of whom he inquired, that the plaintiff was the brother of Nicholas Stone, deceased." It will be readily perceived that the question there presented, and to which the reasoning of the court is confined, was wholly different from the one involved in this case. The evidence was clearly hearsay, and the court regarding it as such held it to be inadmissible,—not coming within the limited rule admitting from necessity hearsay evidence in cases of pedigree.

After a very patient examination of the numerous authorities cited in the argument of this case, we have concluded that general reputation in regard to marriage may be proved by the testimony of a witness speaking from his own knowledge of the existence of such general reputation, except in cases of adultery or bigamy, in which strict proof is required. In reference to the position that general reputation, even if admissible to prove marriage, is not admissible to negative a presumption of marriage from cohabitation, it may be said that the evidence is not admitted upon the ground that the public has an interest in proving a marriage, but upon the ground of a public interest in the question of a marriage between two parties. It is admissible as a fact to show whether or not a marriage exists. When a question is propounded to a witness, its legality cannot be made to depend upon the affirmative or negative character of his answer. It must therefore follow, as argued by the appellants' counsel, "if such evidence is competent to prove marriage, it is competent in disproof of marriage." Upon these views of the law this case will be decided; and there is therefore no error in the court below in admitting the testimony objected to by the appellants in the second and third exceptions. The evidence offered in the first exception, and ruled out by the court, was afterwards admitted under the agreement of counsel, which the appellants repudiated in their first offer, and they have had the benefit of it before the jury. They have therefore sustained no injury, and the question raised by this exception having become a mere abstraction, the ruling below, even if it appeared to be erroneous, will not be reversed.

We do not perceive anything in the fourth exception which can entitle the appellants to a reversal. The testimony, to the admission of which they had only reserved an exception, was by permission of the court withdrawn by the defendant before the bill of exceptions embodying it was presented, be-

fore the prayers were submitted, and before the counsel of either party had gone before the jury. The exception is to the permission of the court allowing the testimony to be withdrawn. Under the law, as above announced, it is probable that the testimony was admissible, but whether admissible or not, it being withdrawn, and the jury directed not to consider it in making up their verdict, we cannot see that any harm resulted to the appellants, or any error was committed requiring the intervention of this court in their behalf. The fifth exception was abandoned at the argument. The sixth exception presents for consideration the prayers offered on both sides. The first prayer of the defendant correctly lays down the law in the case, and is sustained by the views we have expressed in regard to the admissibility of evidence of general reputation. The evidence of a previous marriage of Elizabeth Parlett to one Parlett, and his surviving her, upon which the second prayer of the defendant is based, was admitted without objection. The evidence relied upon by the appellants to establish a marriage between Boone and Elizabeth Parlett raised a presumption only of such marriage, and did not amount to strict proof. The province of the jury was to determine, upon the facts before them, whether or not such a marriage had really existed. If Elizabeth was the wife of Parlett, and he survived her, she could not have contracted a valid marriage with Boone. This prayer was therefore properly granted, and the fifth, sixth, fifteenth, sixteenth, and eighteenth prayers of the plaintiff, presenting substantially the converse, were properly refused. The fourth prayer of the plaintiff extends the law to its utmost verge, even where there is strict proof of marriage, but is not applicable to a case like the present, in which a presumption only of marriage is raised by the proof. The eighth prayer, in view of all the evidence in the case, could not have been granted, and there being no evidence in the record upon which the seventeenth prayer is based, it is unnecessary to examine the question sought to be raised by it. The law was most liberally stated for the appellants by the court below in granting, with the consent of the defendant, their first, second, third, seventh, ninth, tenth, eleventh, twelfth, and thirteenth prayers. The instructions granted fully covered the law in the case, and the judgment below must be affirmed.

Judgment affirmed.

HEARSAY EVIDENCE UPON MATTERS OF PEDIGREE: See *Crawford v. Blackburn*, 77 Am. Dec. 323, note 328, where other cases are collected.

REPUTATION AND COHABITATION AS EVIDENCE OF MARRIAGE: See *Chiles v. Drake*, 74 Am. Dec. 406, note 413, where other cases are collected. In *Redgrave v. Redgrave*, 38 Md. 97, it was said, citing the principal case, that the most usual way of proving marriage, except in actions for criminal conversation and in prosecutions for bigamy, is by general reputation, cohabitation, and acknowledgment.

THE PRINCIPAL CASE IS ALSO CITED IN *Providence L. I. Co. of N. Y. v. Martin*, 32 Md. 317, in support of the proposition stated in the last paragraph of the *syllabus*.

HAMILTON v. CONINE.

[28 MARYLAND, 685.]

ASSUMPSIT CANNOT BE MAINTAINED BY ONE TENANT IN COMMON AGAINST HIS CO-TENANTS to recover for services rendered by him in selling the common property, and for money expended by him in advertising the property.

IN MARYLAND, TENANT IN COMMON MAY MAINTAIN ACTION OF ACCOUNT against his co-tenant in cases to which it is applicable; but this form of action is seldom used, a bill in equity being in most cases the more convenient and effectual remedy.

TENANTS IN COMMON ARE SIMILAR TO PARTNERS in reference to the right to sue each other and the mode of doing so. The rules of law governing actions between the latter apply with equal force to actions between the former.

ASSUMPSIT. The opinion states the case.

Benjamin F. Horwitz, for the appellant.

Levin Gale, for the appellees

By Court, MILLER, J. Hamilton, Conine, Purviance, and Presstman were tenants in common of certain improved real estate in Baltimore city, each owning an undivided fourth part. This action of *assumpsit* was instituted by Hamilton, who was an auctioneer and real estate broker, against Conine and Purviance, two of his co-tenants, to recover expenses paid by him for advertising the property for sale, for his services as auctioneer, and for commissions on the amount of a private sale negotiated by him. The declaration contains the common counts, including those for work done by the plaintiff for the defendants at their request, for money paid by the plaintiff for the defendants at their request, and for money found due from the defendants to the plaintiff on accounts stated between them; the plea was, not indebted as alleged. The proof upon

which the plaintiff seeks to recover the costs of advertising and for his services as auctioneer is, that he advertised the property and put it up at auction at the request of the defendants. The advertisement was of the whole property, and not of the undivided shares of the defendants. A part of the property was bid in at public sale by one Smith, but this sale was not completed, because Presstman refused to be bound by it. A private sale of the whole for eight thousand dollars was then negotiated by the plaintiff with one Myers, but this sale also proved ineffectual, and was never completed because of the refusal of the parties interested, or some of them, to execute a deed, after the claim for commissions was made by the plaintiff, and the property, so far as the record shows, still remains unsold. The claim for commissions is put upon the ground that the sale to Myers was negotiated by the plaintiff, that the price and purchaser were satisfactory, and the latter was ready and willing to pay, and the sale was broken off, or failed to be consummated, through no fault of the purchaser or plaintiff.

At the root of the case lies the question whether, in view of the relation of the parties and upon the facts proved, this action can be maintained. No Maryland authority has been or can be cited in its support; and it is admitted that at common law an action of *assumpsit* cannot be brought by one tenant in common against his co-tenant. By the statute of 4 Anne, c. 16, sec. 27, it was provided that "actions of account shall and may be brought and maintained by one joint tenant and tenant in common against the other as bailiff for receiving more than comes to his just share or proportion." This form of action thus given by statute, as well as the common-law action of account, is in practice but seldom used, a bill in equity being in most cases the more convenient and effectual remedy; but the action of account may still be resorted to in this state in cases to which it is applicable: *Gibbs v. Clagett*, 2 Gill & J. 17; *Green v. Johnson*, 3 Id. 394. Here, as in England, common-law and equity jurisdictions are carefully separated, and we have closely followed the English practice. We see no good reason why it should be departed from in this instance. In Browne on Actions at Law, 132 (45 Law Lib. 99), the rule is thus stated: "Joint tenants, tenants in common, and coparceners cannot in general maintain any action against each other, because they are in the nature of partners"; and in 1 Chit. Pl. 89, it is said: "At law, one partner or tenant in com-

mon cannot in general sue his copartner or co-tenant in any action in form *ex contractu*, but must proceed by action of account or by bill in equity." In reference to the right to sue each other and the mode of doing so, tenants in common are thus assimilated to partners; the rules of law governing actions between the latter apply with equal force to the former, and this analogy runs through all the decisions. Amongst the exceptions to the rule just stated are, as to partners, cases where, on a final balance of all accounts, a particular sum is found due to one partner which the other expressly promises to pay, or where the articles of partnership contain a covenant for a breach of which an action of covenant is maintainable if the articles be under seal, or of *assumpsit* if the partnership be created verbally or by writing only. Among the instances in which the rule has been enforced is one especially applicable to the present case. A, an attorney, and B and C had been members of a trading company; after the dissolution of the company, B and C were sued by its creditors, and they retained A to defend the actions; and in the course of making that defense a bill of costs was incurred. It was held by all the judges that A, being, as a member of the company, jointly liable to contribute to the expense of defending these actions, could not maintain an action at law against B and C for his bill of costs: *Codd v. Toomer*, 7 Barn. & C. 419. "It is in general an answer to an action that a party is legally interested in both sides of the question": 1 Chit. Pl. 40. The rule that one partner cannot maintain an action against his copartner for work and labor done on account of the partnership was also stringently enforced in the case of *Causten v. Burke*, 2 Har. & G. 295 [18 Am. Dec. 297]. The plaintiff in that case was associated with the defendant and others in a particular concern, not rendering it the duty of any of them to leave their place of residence, and at a meeting of the association, when the plaintiff was not present, it was proposed to employ him to go to a distant place to look after the property of the concern. The plaintiff was then sent for, accepted the employment for a fixed compensation, performed the services required, and brought an action of *assumpsit* against one of the partners to recover the sum agreed to be paid him. This agreement was held to be an undertaking on account of the concern; that the same agreement entered into with a stranger would have been binding on the firm, and the plaintiff, as a member of that firm, must have contributed his proportionate

part of the sum contracted to be paid, and therefore could not sustain his action. The case of *Kennedy v. McFadon*, 3 Har. & J. 194 [5 Am. Dec. 434], furnishes another illustration of the extent to which the courts of this state have gone in denying the right of one partner or joint owner to sue the other at law in an action of *assumpsit*.

It is impossible to distinguish the present case in principle from those just cited. The services rendered by the plaintiff, for which he seeks to recover in this action, were done during the continuance of the tenancy in common, on account of the whole common property, and inured to the benefit of all the joint owners; and if performed by a stranger the suit would have been against the four jointly, and the plaintiff must have contributed his proportionate share towards paying for them. The same reason, therefore, holds against his right to maintain this action. It is difficult to find authorities precisely in point in the courts of other states, probably for the reason that the well-settled practice has been so generally followed that such suits at law have rarely been attempted. *Sherman v. Ballou*, 8 Cow. 311, was a case where a guardian of two tenants in common received the rents belonging to the three, and it was held the third could not maintain *assumpsit* against the guardian for his share; "that such an action could not be sustained was," says Chief Justice Savage, "the reason for providing by statute for the action of account." In the case of *Beach v. Hotchkiss*, 2 Conn. 425, the plaintiff, the defendants, and others, were joint owners in equal proportions of goods shipped to the West Indies, and by consent of all concerned the whole property was put into the hands of the defendants, who received the proceeds, stated the account, ascertained the amount due to each, and actually paid one of them his share, and yet the court held the plaintiff could not maintain *assumpsit* to recover the sum due him; that between copartners the action must be account, unless there has been a settlement between them, and a balance struck, or an express promise to pay. In speaking of the action of account, Hosmer, J., says the difficulty attending it is not intrinsic, but adventitious, resulting from the old mode of practice, that under the more simple practice prevailing in that state, it was neither more objectionable on the ground of expense or protracted litigation than any other action, and that "between partners and tenants in common it is, for the most part, the only suit in which justice can be administered." It may here be re-

marked in passing, that other eminent jurists besides Judge Hosmer have doubted whether this form of action justly deserves all the odium into which it has fallen. In *Godfrey v. Saunders*, 3 Wils. 94, a matter which had been fruitlessly pending in chancery upwards of twelve years was thoroughly examined before auditors in this form of action, and finally determined in the course of two years; and Lord Chief Justice Wilmot, in delivering his judgment upon a point arising in the case, remarked he was "glad to see this action of account revived in this court." In this state, where suits are brought against administrators and executors, and the plea of *plene administravit* is interposed, the practice of most of our courts is to refer the cases to the auditors to state accounts of assets; yet this practice, with the attendant delay, has not deterred the profession here from bringing such actions, or made them less frequent.

On the part of the appellant, the case of *Coles v. Coles*, 15 Johns. 159 [8 Am. Dec. 231], has been relied on. There two tenants in common sold and conveyed their land and all the money was received by one, and it was held the other could maintain an action for money had and received for his moiety. But that case comes within the rule of the English decisions that the sale determines the joint interest. "If one sell the subject-matter in which they are interested, money had and received lies by the other, because the sale determines the interest": Browne on Actions at Law, 132.

Several decisions in Massachusetts have been pressed upon us by the appellant's counsel, and particularly the case of *Dickenson v. Williams*, 11 Cush. 258 [59 Am. Dec. 142], where it was decided that one tenant in common may maintain *assumpsit* against his co-tenant for money expended by him in removing a joint encumbrance upon the estate, and for his share of the money actually received by the co-tenant from sales of the common property, though the tenancy in common still continued. As to these decisions, it is to be observed that the Revised Statutes of Massachusetts of 1836, chapter 118, section 43, abolished the action of account, and provided that "when the nature of an account was such that it could not be conveniently and properly adjusted and settled in an action of *assumpsit*, it may be done upon a bill in equity." By this statute, as was said by Chief Justice Shaw, in *Munroe v. Luke*, 1 Met. 464, the matter was put beyond doubt in that state that *assumpsit* will lie in such cases. But besides this statu-

tory provision, which destroys the force of those decisions as authorities, the case in 11 Cushing announces doctrines in relation to suits between copartners which prevent its being followed as an authority here, without overruling decisions of our own courts on the same subject. Our attention has also been called to the case of *Borrell v. Borrell*, 33 Pa. St. 492, where it was also held that one tenant in common may maintain *assumpsit* against his co-tenant to recover a share of the profits upon proof that the whole was received by the defendant, and where Judge Porter casts some pleasant ridicule upon the old action of account for its "cumbersome machinery, and want of speed," and announces the court's determination "to allow common sense another triumph by holding the action of *assumpsit* maintainable in such cases." To this may well be replied what was said in an analogous case between partners by Chief Justice Tilghman, in delivering the opinion of the supreme court of the same state in *Ozeas v. Johnson*, 1 Binn. 192: "No case has been cited to show that an action like the present can be maintained unless the partners have settled their account and struck a balance. It is of importance that the forms of actions should not be confounded. They are founded in good sense and convenience. The defendant has an interest in insisting that the proper form of action should be preserved, of which this court has no right to deprive him." We have had, and still have in this state, statutes simplifying the forms of pleading and practice; but the substantial distinctions between different actions have never been disregarded by our courts. Even the act of 1856, chapter 112, which for a time remained unmodified, was construed by our predecessors as permitting the distinctive nature of actions still to remain, though abolishing old forms, and adopting new ones; the substantial principles underlying our system of jurisprudence, and to some extent governing the forms of actions, must still be recognized, however the form may be changed or simplified: *Sterling v. Garritee*, 18 Md. 468. Looking, then, to the uniform tenor of our decisions in reference to suits between joint owners, joint contractors, co-executors and administrators, and partners to the fact that equity and common-law jurisdictions are here separated, and to the entire absence of any trace in our reports of adjudged cases of any instance in which such a suit has heretofore been attempted as between tenants in common, we are not at liberty to sanction the innovation upon the settled practice of the state which would be introduced by

allowing the present action to be maintained. Nor can we assent to the position that the statute of 4 Anne, chapter 16, merely puts the action of account by way of example, and not by way of limitation, and that by a liberal construction of that statute, and because parties are now by our laws allowed to become witnesses in their own cases, all distinctions between the forms of actions and the jurisdictions of our common-law and equity tribunals should, in such cases as this, be abolished. It follows from what has been said the court below committed no error in refusing to grant the appellant's prayers, and we forbear expressing an opinion whether the law as stated in the second prayer would be correct in a case where no objection to the form of action existed. Having decided this action cannot be maintained, we also refrain from expressing any opinion as to the instructions granted by the court, for the appellant has suffered no injury therefrom. The case is one in which the court below would have been authorized to instruct the jury that upon the pleadings and proof the plaintiff was not entitled to recover because of misconception of his remedy. The judgment, being in favor of the defendants, must be affirmed.

Judgment affirmed.

ACTIONS BETWEEN CO-TENANTS: See *Crane v. Waggoner*, 39 Am. Dec. 493, note 494; *Fiquet v. Allison*, 86 Id. 54, note 56.

CASES
IN THE
SUPREME JUDICIAL COURT
OF
MASSACHUSETTS.

WOODBURY v. LUDDY.

[14 ALLEN, 1.]

HOMESTEAD RIGHT CANNOT BE LOST BY ABANDONMENT, under the Massachusetts statute of 1855, until a new homestead is acquired elsewhere. VENDEE OF LAND WILL BE ALLOWED ONLY FAIR VALUE OF WHAT IS NOT CONVEYED, where the vendor is unable to give a perfect title, and the vendee elects to take such title as the vendor can give, with compensation for the deficiency.

BILL in equity to compel the specific performance of a written contract, by which the defendant agreed to convey to the plaintiff certain land, free from encumbrance. The master to whom the case was referred reported that the lot was subject to the inchoate dower right of the defendant's wife, the value of which, estimated by the tables of mortality, would be \$269, which sum he allowed as damages; and that a homestead had been acquired in the premises under the statute of 1855, but that in 1858 the defendant removed with his family from the lot, leasing the same to a tenant, and although they since returned to it, there was no evidence on the part of either the defendant or his wife to continue the homestead right therein. The master estimated the value of the homestead right at \$533, but made no allowance therefor, deeming the same to have been lost by abandonment. The plaintiff excepted to the master's report because he made no allowance for the homestead right, and because he adopted an erroneous measure of damages for the breach of the contract in failing to convey the right of dower.

G. O. Shattuck and J. B. Thayer, for the plaintiff.

S. B. Ives, Jr., for the defendant.

By Court, HOAR, J. The first question on the exceptions taken to the master's report is, whether he was right in finding that the wife of the defendant had no right of homestead in the estate which was the subject of the contract.

It is conceded that a homestead estate was acquired under the statute of 1855, and that no new homestead has since been gained by the defendant. But the defendant removed with his family, in 1858, from the lot on which he had acquired a homestead, and the report finds that there is no evidence of any act or intent on the part of either the defendant or his wife to continue the right in the house or lot from which they removed, though they have since returned to it. While they ceased to occupy it, the defendant leased it to a tenant. The question is, therefore, whether the homestead right was lost by abandonment.

There is great difficulty in reconciling the language used in the various decisions upon the subject.

The statute of 1855 created the homestead exemption in the farm or lot, and buildings thereon, "occupied as a residence, and owned by the debtor, or any such buildings owned by the debtor and so occupied on land not his own, but of which he shall be in rightful possession, by lease or otherwise, he being a householder and having a family." It provided that no release or waiver of such exemption should be valid, unless by deed for good consideration, acknowledged and recorded as in the case of conveyances of real estate; and that the exemption should continue after the death of the householder for the benefit of the widow and children of the deceased party, some one of them continuing to occupy such homestead until the youngest child should be twenty-one years of age, and until the death of the widow. It further provided that no conveyance by the husband of any property thus exempted should be valid in law unless the wife joined in the deed of conveyance.

In the subsequent statutes which create a homestead estate there are different provisions, which do not affect the homestead exemption acquired under the statute of 1855.

There is nothing in the language of the statute which would show that the "release or waiver" which it names is applicable to anything else than the homestead exemption for which

it provides; that is, the exemption of a homestead occupied as a residence by the debtor. And it would not seem an unnatural construction to hold that, as the exemption was only of a homestead thus occupied, the removal of the owner from the property exempted would terminate the homestead; not by reason of any waiver or release, but because the condition of the exemption thereby ceased to exist. The continuance of the right to the widow and children was made expressly dependent on the continuance of the occupation. And this was the view which was taken in some of the earlier decisions. Thus in *Drury v. Bachelder*, 11 Gray, 214, it is said by Mr. Justice Dewey: "That a homestead right or exemption may be lost, is obvious. Such would be the effect of acquiring a new homestead by a change of place of residence, or by other acts of abandonment of an unequivocal character by all parties interested in its continuance." But in that case it was held that there had been no such change of residence as to constitute an abandonment; and the reasoning of the court implies that the removal of the husband without the consent and concurrence of the wife would not be sufficient.

But in *Connor v. McMurray*, 2 Allen, 202, it was expressly decided that a right of homestead acquired under the statutes of 1857, chapter 298, was not lost by the removal of the householder and his family from the premises, the court saying that the provision in the statute that "no release or waiver of such exemption shall be valid in law unless by deed, acknowledged and recorded as in the case of conveyances of real estate," is a complete and decisive answer to the suggestion that the homestead would be lost by removal. This provision is precisely the same in the statute of 1855. The statute of 1857 contains a clause not found in that of 1855, to the effect that no new right of homestead should be acquired until a previous one had been discharged or released by a deed, with the consent of the wife expressed therein; which, in connection with the requirement that a homestead right should be a matter of record, would tend to support the conclusion to which the court arrived, and perhaps furnishes the most conclusive reason for it; but the reason given in the opinion is applicable alike to both statutes. In *Doyle v. Coburn*, 6 Allen, 71, it was held that the removal of the wife and children of the owner, and the sale of the premises on an execution against him, did not defeat his right of homestead exemption if he continued personally in possession. The case of *Castle v. Palmer*, 6 Id.

404, is only to the point that a deed of the husband, in which the wife does not join, is inoperative to release the homestead, even during his life. In *Dulanty v. Pyncheon*, 6 Id. 510, the court held that the removal from the premises for a temporary purpose, with the intention to return, would not affect the homestead right; and this was sufficient for the decision of the case. But the chief justice, who delivered the opinion, gave as an additional reason for it that a homestead right, once acquired under the statute of 1855, could not be discharged except by deed. In *Lazell v. Lazell*, 8 Id. 575, the decision was placed on the ground that the removal from the premises was not shown to be for other than a temporary purpose. Mr. Justice Dewey then observes, after citing *Drury v. Bachelder*, *supra*, and *Dulanty v. Pyncheon*, *supra*, that "these and other reported cases indicate strongly the views of this court to be, that if any abandonment can have the effect to defeat an existing homestead, upon which we express no opinion, it must be full and complete, and under circumstances that leave no doubt that such was the intention of all parties interested in the homestead right, and that they had a settled purpose not to return to the same as a place of residence." He does not refer to *Connor v. McMurray*, *supra*, and seems to consider the question as open.

As the decision in *Connor v. McMurray*, *supra*, was under the statute of 1857, and was clearly right under the special provisions of that statute, and as the decision in *Dulanty v. Pyncheon*, *supra*, rests upon satisfactory grounds, not dependent upon the question now before us, there could be no insurmountable objection to treating the provisions of the statute as still unsettled by judicial construction.

But the decisions which have been made upon another part of the statute seem to us conclusive, and to establish by authority the construction that no abandonment of the premises to which the homestead exemption has once attached will be sufficient to terminate it until a new homestead is acquired elsewhere. The original exemption is created by the statute not merely by reason of the ownership and occupation of the land or buildings, but it requires also that the occupant shall be a householder and have a family: *Woodworth v. Comstock*, 10 Allen, 425. No good reason can be given why the continuance of one of these conditions should be held essential to the continuance of the homestead more than of the other. But in *Doyle v. Coburn*, 6 Id. 71, it was expressly held that the home-

stead was not lost by the loss of his family by the householder. And see also *Silloway v. Brown*, 12 Id. 30.

The first exception to the master's report is therefore sustained; and there must be added to the sum which the defendant is to pay on account of his failure to convey the estate, with a release of dower, the sum of \$533, which is found to be the present value of the homestead right. The other exception to the report cannot be supported.

The general rule undoubtedly is, that when a person can only partially perform a contract into which he has entered, he must respond in damages to the extent of the difference in value between that which the other party receives and that to which the contract entitled him. And this is found by taking the market value of what is delivered, and deducting it from the market value of the whole subject of the contract: *Wetherbee v. Bennett*, 2 Allen, 423. But this rule is not universal; and in the case of an encumbrance on an estate conveyed with covenants of warranty, the more usual measure of damages for the breach of the covenant against encumbrances has been the market value of the encumbrance, where this was capable of an exact estimate: *Estabrook v. Hapgood*, 10 Mass. 315.

But under the peculiar relation of the parties, we can have no doubt that the latter rule is the just one. The plaintiff seeks the aid of a court of equity to compel the specific performance of the defendant's contract to convey land. The defendant is unable to make a perfect title; and the court, at the plaintiff's election, will compel the conveyance of so much as the defendant can convey, and will award compensation in the nature of damages for the deficiency. The defendant has not undertaken to apportion the contract. If he were sued at law, the whole market value of the estate would be the measure of damages. But dividing the estate may very much increase the proportionate damages, without any corresponding advantage to the defendant. By making the election, the plaintiff undertakes to receive what the defendant never agreed to give; namely, a partial conveyance of the estate; and equity will only allow this on the condition that the defendant shall not thereby be subjected to unreasonable injury. The plaintiff in effect elects to take satisfaction partly in land and partly in money; and if he is allowed to do this, he should only in equity be allowed to receive the fair money value of the part of the estate which is not conveyed to him. In the adjudged cases, though this is sometimes called damages, it is more

usually spoken of as an equitable compensation for the value of that which the defendant does not convey.

Decree accordingly.

ABANDONMENT OF HOMESTEAD, WHAT CONSTITUTES: See *O'Brien v. Mulligan*, 87 Am. Dec. 247, and note collecting prior cases; *Jess v. Mills*, 87 Id. 238; *Allison v. Shilling*, 86 Id. 622.

VENDEE MAY ELECT TO TAKE SUCH TITLE AS VENDOR CAN GIVE: *Beane v. Kingsberry*, 14 Am. Dec. 779; *Corson v. Mulcahy*, 88 Id. 485. The principal case is referred to in *Davis v. Parker*, 14 Allen, 105, on the point that where a vendor is unable to procure a release of his wife's right of dower in the land, in accordance with his covenant, the vendee is entitled to a conveyance without the right if he elects to receive it, and to a deduction from the purchase-money of the value of the encumbrance.

MEASURE OF DAMAGES FOR FAILURE OR DEFECT IN TITLE TO LAND CONVEYED OR AGREED TO BE CONVEYED: See *McConnell v. Dunlop*, 3 Am. Dec. 723; *Rohr v. Kindt*, 39 Id. 53; *Fernander v. Dunn*, 65 Id. 607; *Foley v. McKeegan*, 66 Id. 107; *Hall v. Delaplaine*, 68 Id. 57; *Beaupland v. McKeen*, 70 Id. 115.

THE PRINCIPAL CASE IS CITED, among others, in *Abbott v. Abbott*, 97 Mass. 138, to the point that a right of homestead is a freehold estate, defensible during the life of the householder only by deed in which his wife, if any, or if she is insane, her guardian, joins, or by acquiring a new homestead; and in *Brettun v. Fox*, 100 Id. 235, to the point the Massachusetts homestead act of 1855, in its scope and effect, manifestly applied, with the exceptions declared in it of existing debts and encumbrances, to lands in the possession of those who owned them at the time of its passage, and has always been so understood.

MANNING v. ALBEE.

[14 ALLEN, 7.]

PRESIDING JUDGE AT TRIAL IS NOT BOUND TO RULE ON QUESTION WHETHER PLAINTIFF'S EVIDENCE IS SUFFICIENT TO SUPPORT ACTION, unless the defendant will rest his case.

VENDOR MAY MAINTAIN REPLEVIN FOR GOODS WHICH HE HAS BEEN INDUCED BY FRAUD TO SELL, against a purchaser from the vendee who was a conspirator in the fraud, or who had notice of it, although the vendor transferred the vendee's note for the price for value, and never reclaimed it, the note not having been negotiated by the vendor with such knowledge or under such circumstances as to amount to an affirmation of the sale.

REPLEVIN. The answer simply set up title in the defendant. The plaintiff, who was the owner of a stock of clothing at his store in Rockport, advertised the same for sale. One French, a stranger to the plaintiff, proposed to purchase the stock, and a few days afterwards called with the defendant, also a stranger to the plaintiff, for the nominal

purpose of appraising the goods. French proposed to execute his note to the plaintiff for the price, and to give as collateral security two railroad bonds for one thousand dollars each, which French and the defendant said were perfectly good, worth at the time eighty-two cents on the dollar, and still increasing in value; and French, at the defendant's request, showed the plaintiff a newspaper which purported to contain a quotation of a sale of the bonds at eighty-two cents. The plaintiff, relying on these representations, sold the goods to French, taking French's note and the bonds as security, and leased French the store for a year. French employed a man to take charge of the goods, left Rockport, and was not seen or heard from afterwards by the plaintiff. A few days thereafter the defendant took possession of the goods and the store, claiming to have bought the goods from French. The plaintiff, upon inquiries, found his securities to be worthless, and that there had been no sales of them as represented. The plaintiff thereupon brought this action, claiming that the defendant took the goods with notice of the fraud, and had conspired with French thus to obtain them. The plaintiff before the commencement of the action had indorsed and transferred the note to a third person. At the conclusion of the plaintiff's evidence, the defendant asked the court to rule that the evidence was insufficient to support the action, but the judge declined to make the ruling, unless the defendant would rest there. The defendant refused to do this, and the trial proceeded. The defendant also asked the court to rule that if the plaintiff had ceased to be the owner of the note before the replevin, but had passed it away for value, and had never reclaimed it, then he could not maintain this action; but the judge declined so to rule, and instructed the jury that the question to whom the note belonged was immaterial upon any issue raised in the case, and at the request of the plaintiff, submitted this as an independent issue to the jury, who found that the note was the property of the indorsee at the time of the replevin. The jury also returned a general verdict for the plaintiff. The defendant alleged exceptions.

W. C. Endicott and B. H. Smith, for the plaintiff.

S. B. Ives, Jr., for the defendant.

By Court, GRAY, J. The judge presiding at the trial was not bound to determine whether the plaintiff could maintain his action until all the evidence was in; and his refusal to

rule upon the plaintiff's case only is no ground of exception: *Bassett v. Porter*, 4 Cush. 487.

It was decided when this case was before us last year that the false and fraudulent representations offered to be proved would support the action; and that the fact that the note taken from a third person for the price of the goods had not been surrendered did not defeat the plaintiff's right to recover against this defendant: *Manning v. Albee*, 11 Allen, 520. The ruling requested by the defendant, "that if the plaintiff had ceased to be the owner of the note before the replevin, but had passed it away for value, and had never reclaimed it, then he could not maintain this action," was rightly refused, and the special finding of the jury that the note was the property of the indorsee at the time of the replevin was immaterial.

The question whether the note had been negotiated by the plaintiff with such knowledge or under such circumstances as to amount to an affirmance of the sale, does not appear to have been raised or ruled upon at the trial, and is not therefore open to the defendant in this court.

Exceptions overruled.

VENDOR MAY RECLAIM GOODS OBTAINED BY VENDOR THROUGH FRAUD, as against all persons except *bona fide* purchasers for value: *Atwood v. Dearborn*, 79 Am. Dec. 755, and note collecting prior cases.

THE PRINCIPAL CASE IS CITED in *Cox v. Cook*, 14 Allen, 166, to the point that if a judge is of the opinion that there is evidence to be considered by the jury, and declines to order a nonsuit, no exception lies to such decision; and in *Wetherbee v. Potter*, 99 Mass. 360, to substantially the same effect; and see it also cited, in connection with *Manning v. Albee*, 11 Allen, 520, in *David v. Park*, 103 Mass. 503, and in *Bassett v. Brown*, 105 Id. 558.

BOYNTON v. HAZELBOOM.

[14 ALLEN, 107.]

SPECIFIC PERFORMANCE OF CONTRACT TO EXCHANGE FARM FOR TENEMENT

HOUSES WILL NOT BE DECREED in favor of the owner of the houses, who induced the defendant to enter into the contract by means of material misrepresentations of the amount of rent yielded by the houses; although such representations were not fraudulent, and the plaintiff offers to make good the deficiency in the rent, and although the contract was partially executed before the representations were discovered to be untrue.

BILL in equity. The facts are stated in the opinion.

I. S. Morse and J. B. Goodrich, for the plaintiff.

J. G. Abbott, for the defendants.

By Court, WELLS, J. This is a bill in equity to compel the conveyance, by husband and wife, of certain real estate of the wife held to her sole and separate use, in specific performance of a contract for the exchange of lands. The contract was under seal, executed by the husband in his own name, and neither the wife nor her interest in the land is mentioned in the instrument. The plaintiff contends that the wife can be required to execute a deed: 1. Because the land was in reality the property of the husband, placed in her name merely as a cover, and in fraud of creditors; 2. Because the contract was made by the husband as her agent, either by previous authority or subsequent ratification; and 3. Because it has been partially executed with her assent and concurrence, possession having been taken, and the plaintiff having incurred some expenditures. The defense, besides a denial of the above grounds for maintaining the bill, rests upon alleged misrepresentations in regard to the rents of the houses that were to be given in exchange; by which the defendants were misled and induced to agree to the exchange, and to commence upon the execution thereof.

The testimony shows clearly, and without any conflict, that the defendants acted in the whole transaction (until they repudiated the bargain upon finding the facts to be otherwise), upon the distinct understanding that the tenements, which were to be received from the plaintiff in exchange, were at that time (January, 1866) rented at certain named rates of rent. It so appears in the memorandum of the plaintiff's first proposition, prepared in the office of the broker employed, and exhibited to the defendants. A strong preponderance of the testimony also shows that it was explicitly so represented to Hazelboom by the plaintiff. Boynton himself will not swear that he did not so state; though the tenor of his testimony is that he represented merely that the houses would rent for such rates. He meets the stress of the case by introducing witnesses to prove that the houses were worth and would rent for the rates named; that he had caused his tenants to be notified that the rents would be at those rates from and after January 1st; and that he offered, when Hazelboom had refused to proceed further on this account, to make it good to him, or to take a lease himself of the whole property

at those rates. It appears that Boynton had raised the rents of several of the tenants in November previous. In January he determined to make a still further advance, the advantage of high rents in negotiating a sale being one of his reasons therefor, and caused notices to be given to all his tenants that the rents would be fixed, from and after January 1st, at the rates named in his dealings with the defendants. But the tenants had not agreed to comply. Several of them refused to comply, and as their tenancies had not been legally terminated, continued to occupy at the former rates of rent. His own agent for the collection of rents considered the rates too high at that time, although afterwards he was able to rent such of the tenements as became vacant at those rates, there being a general advance of rates of rent in the spring following. Immediately upon the discovery of these facts as to the rents, the defendants refused to proceed further in the execution of the agreement for exchange, assigning it as the ground of refusal.

Assuming the plaintiff's position, that he in good faith supposed his proceedings in relation to the tenants were sufficient to justify his representations as to the rents, so as to relieve him from any charge of fraud or intentional misrepresentation, there still remains the fact that the defendants made whatever agreements they have made or assented to under a misapprehension occasioned by the plaintiff. It was a mistake of fact in a material point affecting the proposed exchange of property. An offer of tenement houses already rented to tenants at certain rates of rent is not made good by a conveyance of such houses in the actual occupation of tenants, with all the rights and incidents which pertain even to mere tenancy at will or sufferance, who have not agreed to the advanced rates of rent required. Even the advantage of a termination of all tenancies by a deed of conveyance would not give the purchaser the certain present enjoyment of the income contemplated. He would be subject to the necessity of making new contracts, if not to troublesome delays and litigation to oust the tenants. For this he is not bound to accept compensation. He is entitled to have what he contracted for, and cannot be required to accept an equivalent: *Park v. Johnson*, 7 Allen, 378.

In view of this material mistake of facts, under which the defendants entered into the arrangement for exchange of lands, equity will not interpose to compel its specific perform-

ance: *Western R. R. v. Babcock*, 6 Met. 346-352; *Old Colony R. R. v. Evans*, 6 Gray, 25-36 [66 Am. Dec. 394]; *Richmond v. Gray*, 3 Allen, 25. It becomes unnecessary, therefore, to determine whether the wife could be required to execute a conveyance of her lands upon the evidence reported in this case as to her relations to and participation in the proceedings between her husband and the plaintiff.

Bill dismissed with costs.

SPECIFIC PERFORMANCE WILL NOT BE DECREED IN CASES OF MISTAKE: *Frisby v. Ballance*, 39 Am. Dec. 409; *Trigg v. Read*, 42 Id. 447; and see *Old Colony R. R. v. Evans*, 66 Id. 394.

McLAUGHLIN v. NASH.

[14 ALLEN, 126.]

VENDOR IN POSSESSION OF LAND UNDER BOND FOR DEED, WITHOUT PAYING RENT, HAS NOT SAME RIGHT TO REMOVE FIXTURES annexed by him, after a breach of the bond, as an ordinary tenant would have against his landlord; but his rights in this respect are no greater than those of a vendor or mortgagor against his vendee or mortgagee.

IN ASCERTAINING WHAT ARE FIXTURES, REGARD IS TO BE HAD to the object, the effect, and the mode of annexation.

MACHINERY FOR TOOL-MAKING HELD TO BE FIXTURE, when annexed by a vendee in possession to the freehold by being attached with bolts to a block set in the ground, and with screws and bolts to a building; while other machinery and tools, which were not fastened to the land, or which were capable of removal without displacing or materially injuring any part of the building or land, held never to have lost their character as chattels.

BILL in equity for an accounting of partnership property. It appeared from the master's report, to whom the case had been referred to state the account, that on December 1, 1859, one Ira Gerry executed to the plaintiff a bond to convey a certain lot of land, upon the payment of a stipulated price. The plaintiff was to have the privilege of occupying and improving the premises without further charge until the conveyance to him, or default in the payment of the price. Gerry afterwards erected a shop upon the premises, and the plaintiff put into the building certain machinery for tool-making. The engine and boiler were portable, and in their own frames, resting on brick-work on the ground; the trip-hammer was firmly attached with bolts to a block of wood set in the ground; the blower of the forge, the force-pump and its pipes

for raising water on the premises, and the shafting, were fastened to the building with screws and bolts; the planing machine and the anvils simply rested on the floor, without being fastened; the vices were affixed by screws to the work-bench; the grindstone was in a movable frame; and the emery machine was fastened to the floor with bolts. There was also some bench tools, and a stock of iron and steel. Subsequently, on May 1, 1860, the plaintiff and defendant formed a partnership, and the defendant purchased an undivided half-interest in the machinery. The firm was to pay the plaintiff a certain rent for the use of the shop. In the summer of 1861, the condition of the bond was broken, and the plaintiff informed Gerry that he might collect the rent of the premises. On December 20, 1861, Gerry let the shop to the defendant, claiming all that was affixed to the building as belonging to the real estate. The defendant contended that the foregoing articles were fixtures, and therefore not to be accounted for as personal property of the partnership; and this question was reserved for the determination of the full court.

J. P. Converse, for the plaintiff.

W. P. Harding, for the defendant.

By Court, GRAY, J. The articles which the defendant contends were fixtures, annexed to the freehold, and therefore not to be accounted for as personal property of the partnership, were put by the plaintiff into a building erected by Gerry, the owner of the land, of which the plaintiff was in possession under a bond from Gerry to convey it to him upon the payment of a price therein stipulated. The plaintiff had not the same right to remove fixtures annexed by him to the land so occupied by him without paying rent to the owner, under a contract for its purchase, as an ordinary tenant would have against his landlord: *Hutchins v. Shaw*, 6 Cush. 58; *Murphy v. Marland*, 8 Id. 578; *King v. Johnson*, 7 Gray, 239. His rights in this respect were no greater than those of a vendor or mortgagor against his vendee or mortgagee. A mortgage passes even trade fixtures, annexed to the freehold by the mortgagor, for the more convenient use and improvement of the premises, whether before or after the mortgage: *Winslow v. Merchants' Ins Co.*, 4 Met. 306 [38 Am. Dec. 368]; *Butler v. Page*, 7 Id. 42 [39 Am. Dec. 757]; *Walmesley v. Milne*, 7 Com. B., N. S., 115. In ascertaining what are fixtures, re-

gard is to be had to the object, the effect, and the mode of annexation.

The trip-hammer, firmly attached to a block set in the ground, the blower of the forge, the force-pump and its pipes for raising water on the premises, and the shafting fastened to the building by screws and bolts, having been annexed by the plaintiff to the freehold, and specially adapted to be used in connection therewith, became part of it, and could not be severed again without the consent of the owner of the land: *Winslow v. Merchants' Ins. Co.*, above cited; *Richardson v. Copeland*, 6 Gray, 536 [66 Am. Dec. 424]; *Queen v. Lee*, L. R. 1 Q. B. 241.

But under the circumstances stated in the master's report, the engine and boiler, which are expressly found to have been "portable and in their own frames," the planing machine, and the anvils, all of which simply rested on the floor or ground, without being fastened to the land; together with the forge tools and bench tools, the stock of iron and steel, the vises merely affixed by screws to the work-bench; the grindstone in a movable frame, and the emery machine, both of inconsiderable size, more connected in use with the engine and boiler which were not fixtures than with any of the articles which were, and capable of removal without displacing or materially injuring any part of the building or land, and of being used elsewhere as well as on the premises,—never lost the character of chattels, and must be accounted for as assets of the partnership: *Gale v. Ward*, 14 Mass. 352 [7 Am. Dec. 223]; *Winslow v. Merchants' Ins. Co.*, 4 Met. 315 [38 Am. Dec. 368]; *Park v. Baker*, 7 Allen, 78; *Horn v. Baker*, 9 East, 215; *Hellawell v. Eastwood*, 6 Ex. 312, 313; *Cresson v. Stout*, 17 Johns. 116 [8 Am. Dec. 373]; *Murdock v. Gifford*, 18 N. Y. 28.

The report of the master is to be recommitted to restate the account in conformity with this opinion, unless the parties agree.

Order accordingly.

FIXTURES, WHAT ARE, AS BETWEEN VENDOR AND VENDEE: See *Richardson v. Copeland*, 66 Am. Dec. 424, and note collecting prior cases; *Montague v. Dent*, 67 Id. 572; *Johnson's Ex'r v. Wiseman's Ex'r*, 83 Id. 475; *Ogden v. Stack*, 85 Id. 333; *Lacey v. Giboney*, 88 Id. 145; *Smith v. Price*, 89 Id. 284.

IN ASCERTAINING WHAT ARE FIXTURES, the object, effect, and mode of annexation are to be considered: *Pierce v. George*, 108 Mass. 81; *McConnell v. Blood*, 123 Id. 49; *Leonard v. Stickney*, 131 Id. 542, all citing the principal case; and see also *Teaff v. Hewitt*, 59 Am. Dec. 634, and note thereto;

Wall v. Hinds, 64 Id. 64; *Wadleigh v. Janvrin*, 77 Id. 780; *Congregational Society v. Fleming*, 79 Id. 511; *Johnson's Ex'r v. Wiseman's Ex'r*, 83 Id. 475; *Hill v. Sewald*, 91 Id. 209. Whatever is placed in a building subject to a mortgage, by the mortgagor or those claiming under him, to carry out the purpose for which it was erected, and permanently to increase its value for occupation and use, although it may be removed without injury to itself or the building, becomes a part of the realty as between mortgagor and mortgagee, and cannot be removed or otherwise disposed of while the mortgage is in force: *Smith Paper Co. v. Servin*, 130 Mass. 513, citing the principal case.

MACHINERY, WHEN FIXTURE: See *Teaff v. Hewitt*, 59 Am. Dec. 634, and note collecting prior cases; *Harkness v. Sears*, 62 Id. 742; *Richardson v. Copeland*, 66 Id. 424; *Wadleigh v. Janvrin*, 77 Id. 780; *Symonds v. Harris*, 81 Id. 553; *Johnson v. McHaffey*, 82 Id. 568; *Sweetzer v. Jones*, 82 Id. 639; *Lacey v. Giboney*, 88 Id. 145. A portable wood-cutting machine, worked by a belt attached to a factory, is a chattel, and does not pass by a lease of the factory and land: *Holbrook v. Chamberlin*, 116 Mass. 162. So a boiler firmly attached to the land, and which was, in connection with the steam-engine, shafting, and machinery, essential to the enjoyment and use of the building for the purpose of a machine shop for which it was intended, is a part of the realty as between a mortgagor and mortgagee; but counter-shafting, pulleys, hangers, and belts, though fastened to a building, and a portable boiler and steam-pipes connected with it, are either trade fixtures or personal chattels, and may be removed by a lessee who puts them into the building: *Holbrook v. Chamberlin*, *supra*. The principal case was cited to the foregoing propositions.

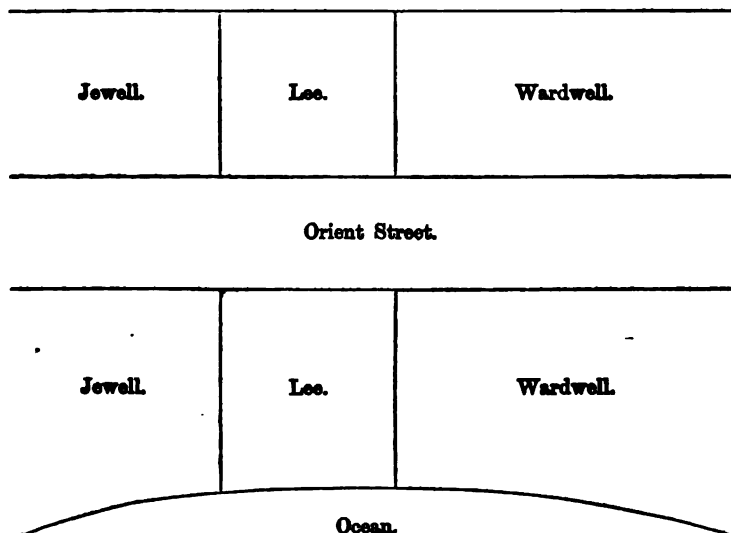
JEWELL v. LEE.

[14 ALLEN, 146.]

CONDITION IMPOSED BY GRANTOR AS TO USE OF PORTION OF LAND GRANTED DOES NOT OPERATE AS PERPETUAL RESTRICTION in favor of subsequent grantees of a part thereof, so that equity will restrain the violation of the condition, as against other grantees, in the absence of any fact or circumstance to show that the condition was annexed for the purpose of improving or rendering more beneficial the occupation of the estate granted, when it should be divided into separate parcels and be owned by different individuals, or with the object of benefiting another tract adjoining to or in the vicinity of the land.

BILL in equity. On May 15, 1856, John D. Bates conveyed to Stephen H. Wardwell and Eben N. Wardwell a tract of land on the north side of Orient Street, in Swampscott, and also a tract opposite on the south side of the street, bordering on the ocean. The deed of the latter tract recited that the conveyance of such tract was "upon condition that the granted premises shall be used for no other purpose or purposes than those for which they are now used, namely, for bathing and boating from the beach, excepting only that low bathing-

houses may be built thereon; it being understood and agreed that the grantee, his heirs and assigns, may ornament the granted premises in such manner as shall not be inconsistent with the foregoing condition." On May 1, 1863, Stephen H. Wardwell released his interest in both tracts to Eben N. Wardwell. On September 29, 1865, Eben N. Wardwell conveyed the westerly end of the tract on the south side of the street to the plaintiff, Harvey Jewell, subject to the condition expressed in the deed from Bates; and by deeds dated November 22, 1864, and January 5, 1866, the plaintiff acquired the title to a lot opposite on the north side. On January 23, 1866, Wardwell conveyed to one Gorham Gray a lot next easterly of the lot conveyed to the plaintiff on the south side of the street, subject to the same condition in the deed from Bates, and also a lot opposite on the north side and east of the plaintiff's lot; and on March 5, 1866, Gray conveyed both lots to the defendant, James Lee, by quitclaim deeds. The situation of the various lots will be seen from the following diagram:—



John D. Bates died in 1856 or 1857, leaving a son as his sole heir and residuary devisee. The defendant agreed to purchase his lots from Gray, on February 22, 1866. He knew of the condition in the deed from Bates to the Wardwells, and endeavored to procure its release from Bates's son. The latter gave the defendant some encouragement that he would release it, and permit him to move a dwelling-house upon the lot, sub-

ject to the condition. The defendant commenced to move the house, but on February 29, 1866, the plaintiff filed this bill to enjoin him. On March 5, 1866, the defendant procured from Bates's son instruments releasing all the owners of the lots on the south side of the street from the condition in the deed from Bates to the Wardwells, but the release to the plaintiff, although recorded, was never delivered to him. The case was reserved for the determination of the whole court.

H. W. Paine and W. Gaston, for the plaintiff.

C. E. Goodrich and J. C. Ropes, for the defendant.

By Court, BIGELOW, C. J. The main ground on which the plaintiff rests his claim to equitable relief is, that the condition annexed by the original owner and grantor to his grant of the entire tract of land, of which the plaintiff and defendant now by mesne conveyances severally hold distinct parcels, constitutes a perpetual restriction on the use of the part now owned by the defendant, in the nature of a servitude or easement, on the observance of which the plaintiff, as the owner of the other part of the original parcel, has a right to insist.

It is doubtless true that such may be the effect of a condition in a class of cases where it is apparent that the condition was annexed to a grant for the purpose of improving or rendering more beneficial and advantageous the occupation of the estate granted, when it should become divided into separate parcels, and be owned by different individuals, or when the manifest object of a restriction on the use of an estate was to benefit another tract adjoining to or in the vicinity of the land on which the restriction is imposed. But in the absence of any fact or circumstance to show such purpose or object, a condition annexed to a grant can have no effect or operation either at law or in equity beyond that which attaches to it by the rules of the common law. The benefit of the condition would in such cases inure only to the grantor and his heirs or devisees, and the burden of it would rest on the estate to which it was annexed, and on those who held it or any part of it subject to the condition. Indeed, no restriction on the use of land, and no condition annexed to its possession and enjoyment, can be for the benefit of the grantee or those holding his estate in the granted premises, unless it be as a consideration of some restriction on other land, which may operate as an advantage or convenience in the use and occupation of the granted premises. Inasmuch as a grantee can restrict the use

of land of which he is the owner according to his own will and pleasure, it is clear that he can derive no benefit from a restriction or condition as such imposed on its use or enjoyment by any prior grantor.

There is nothing in the case before us which in any degree tends to show that there was any intent on the part of the grantor and grantee in the original deed by which the condition was annexed to that grant of the land now owned by the parties to this suit to give any other or different effect to the condition than that which would result from it at common law. It does not appear that the original grantor had in contemplation the division of the land into separate lots or parcels which would be held by different owners, or that the condition was inserted in the grant for the purpose of creating a restriction on the use of the land as between subsequent grantees of different lots or parcels thereof. And this constitutes the precise distinction between the case at bar and that of *Parker v. Nightingale*, 6 Allen, 341, on which the plaintiff mainly relies in support of his case. There it was made to appear that a condition annexed to a grant of an estate was imposed in order to render the occupation of adjacent estates more convenient and advantageous, and that the existence of such condition entered into and formed part of the consideration of the grant of estates which were intended to be benefited thereby. See also *Badger v. Boardman*, 16 Gray, 559. So far as we are able to see, there is nothing to indicate that the original grantor of the premises, in annexing the condition, had any intent to regulate or control the possession or enjoyment of the premises for the benefit of subsequent owners or grantees of the estate, or any part of it, but that it was imposed by him solely for his own private and personal benefit, as the owner of other lots in the vicinity, in which the present plaintiff has no interest whatever.

To the other ground on which the plaintiff asks for equitable relief, we think there are two sufficient answers. In the first place, it is shown that the devisee and sole heir at law of the grantor, in whom the possibility of reverter is vested, had done acts which operated as a temporary waiver of the forfeiture of the condition by reason of placing the building on the premises by the defendant. Certainly the encouragement which was held out to the latter that the former would release the condition, on the faith of which expense and trouble were incurred, was sufficient ground for equitable relief against for-

feiture in favor of the plaintiff in case an attempt had been made to enforce it. It is not shown, however, that at the time of the filing of the bill any such forfeiture was contemplated or threatened. In the next place, the subsequent release of the condition by the devisee and heir at law of the grantor operates to take away all claim which the plaintiff might otherwise have had to relief.

Bill dismissed.

RESTRICTIVE COVENANTS INSERTED IN DEEDS WHEN CREATE EQUITABLE EASEMENTS OR SERVITUDES: See *Hills v. Miller*, 24 Am. Dec. 218, and note; *Trustees of Watertown v. Cowen*, 27 Id. 80; *Barrow v. Richard*, 35 Id. 713, and note; *Whitney v. Union Ry*, 71 Id. 715. The violation of a restriction contained in a deed as to building upon land conveyed cannot be restrained by the purchaser of another part of the land, in the absence of anything to show that there was any general building plan or uniform system of improvement intended by the grantor: *Sharp v. Ropes*, 110 Mass. 336; *Dana v. Wentworth*, 111 Id. 293; *Beals v. Case*, 138 Id. 140; and see *Skinner v. Shepard*, 130 Id. 181; *Jenks v. Williams*, 115 Id. 219; but if the restriction is inserted in pursuance of a general plan or purpose of the grantor, which regards the mutual advantage of all the lots in the hands of the several future owners, each would have an interest in the provision entitling him to enforce it: *Jeffries v. Jeffries*, 117 Id. 189; and see *Frye v. Partridge*, 86 Ill. 272. The principal case is cited to the foregoing propositions. See this subject discussed in 3 Pomeroy's Eq. Jur., sec. 1295.

ANGIER v. WEBBER.

[14 ALLEN, 211.]

GOOD-WILL OF FIRM IS CAPABLE OF VALUATION AND ASSIGNMENT to the remaining partners, upon the outgoing of a partner, and will be recognized and protected by the law.

GOOD-WILL OF FIRM IS BENEFIT OR ADVANTAGE ACCRUING TO IT, in addition to the value of its property, derived from its reputation for promptness, fidelity, and integrity in its transactions, from its mode of doing business, and other incidental circumstances, in consequence of which it acquires general patronage from constant and habitual customers.

EQUITY WILL RESTRAIN VIOLATION OF COVENANT BY OUTGOING PARTNERS NOT TO IMPAIR OR INJURE GOOD-WILL of business transferred by them to a remaining partner on the ground of the inadequacy of the legal remedies, and to prevent a multiplicity of suits.

PARTIAL RESTRICTION ON CARRYING ON TRADE OR BUSINESS IN PARTICULAR LOCALITY IS NOT OPEN TO ANY OBJECTION on the ground of illegality, as violating the rules of sound public policy.

COVENANT NOT TO IMPAIR OR INJURE IN ANY MANNER GOOD-WILL OF BUSINESS IS NOT INVALID, as being in undue restraint of trade, when made between the outgoing partners and the remaining partner of a firm,

which carried on the business of wagoners between the city of Boston and the town of Somerville, occupying stands in certain streets in Boston with horses and wagons.

BILLS in equity by Amos Angier against Orin N. Webber and Gilbert Wakefield, to restrain the defendants "from soliciting for, doing, or obtaining any work, trade, custom, or teaming business for or from any of the customers or persons" who had formerly been customers of the firm of Angier & Co., "and from doing anything to impair or injure the interest and good-will in the teaming business" conveyed by the defendants to the plaintiff. The facts are stated in the opinion.

C. Robinson, Jr., for the plaintiff.

S. J. Thomas, for the defendants.

By Court, BIGELOW, C. J. The rights of the parties to this controversy can be readily ascertained by having in mind a clear idea of the nature of the right or interest which the plaintiff purchased under the name of the "good-will of the business" prosecuted by the defendants, and which they expressly covenanted not to impair or injure in any manner. The plaintiff and defendants, prior to the execution of the agreements between them, had been copartners in carrying on the business of wagoners between the city of Boston and the town of Somerville, occupying stands in certain streets in the city with wagons and horses, where they, or persons in their employment, waited to receive orders for the transportation of merchandise and chattels to and from the places above named. The defendants, at different times, retired from this copartnership, and each sold to the plaintiff his title and rights in the personal property of the firm, together with his "interest and good-will in and to the teaming business" which was at the time of the sale carried on by the firm. That this good-will was a valuable existing interest in the outgoing partner, capable of valuation and assignment to the remaining partners, and which the law will recognize and protect, does not admit of any doubt: Collyer on Partnership, sec. 161; *Kennedy v. Lee*, 3 Mer. 441; *Bryson v. Whitehead*, 1 Sim. & St. 74. Nor can any serious question be made as to the nature of this interest. It was the benefit or advantage which had accrued to the firm, in addition to the value of their property, derived from their reputation for promptness, fidelity, and integrity in their transactions, from their mode

of doing business, and other incidental circumstances, in consequence of which they had acquired general patronage from constant and habitual customers. By the transfer of this interest to him, the plaintiff acquired a right, to the exclusion of the outgoing copartners, — the defendants, — to the enjoyment of the business which had heretofore been intrusted to the firm, and to the favor and patronage of the customers, and to such increase and addition thereto as would necessarily and naturally have accrued if the copartnership had not been dissolved: Collyer on Partnership, sec. 161. It was this right thus acquired which each of the defendants expressly stipulated that he would do nothing in any way to injure or impair.

Turning now to the acts and doings of the defendants proved at the hearing in support of the allegations of the bill, we find that it is abundantly shown that both of them have violated this stipulation. They have entered into a copartnership for the transaction of the same kind of business between the same places of arrival and departure as was formerly carried on by the old firm; they have procured and occupied stands with their wagons and horses in the immediate vicinity of those occupied by the plaintiff, which they had by their agreement relinquished and transferred to him; they have actually engaged in transporting merchandise between Boston and Somerville for many of the customers and friends of the old firm; and have even gone so far as to transact their business at a lesser rate than was charged for such service by the old firm, and than that for which the plaintiff was willing to perform it. These facts show that the defendants have done acts which tend directly to deprive the plaintiff of the benefit of the reputation of the old firm, to take away from him the patronage which appertained to it, and to draw away the business of its habitual customers, to which he had acquired a right by the purchase of the good-will.

For this violation of their covenant the plaintiff is entitled to relief in equity. An action at law will furnish no adequate remedy. The damages are in their nature such as not to be susceptible of proof or exact computation; and the injury caused by the acts of the defendants is a constantly recurring one, for which multiplied suits at law would afford but an imperfect remedy: 2 Story's Eq. Jur., sec. 925; 2 Daniell's Ch. Pr. 1760; *Williams v. Williams*, 2 Swanst. 253.

It was suggested that this stipulation in relation to the

good-will of the firm was invalid, as being in undue restraint of trade. But the doctrine is now too well settled to be called in question that a partial restriction on carrying on a trade or business in a particular locality is not open to any objection on the ground of illegality, as violating the rules of sound public policy.

Injunction granted.

VALIDITY OF CONTRACTS IN RESTRAINT OF TRADE—GENERAL DOCTRINE.—At the early English law, when trade and the mechanic arts were in their infancy, it was considered a matter of the greatest public importance to encourage their growth. The rule was therefore at first established that all contracts which tended in any degree to the restraint of trade were void. So great was the disfavor with which they were looked upon by the courts, that in the Year-book, 2 Hen. V., fol. 5, pl. 26, where debt was brought on a bond conditioned that the defendant would not use his art of a dyer's craft within a certain city for half a year, we find a judge, in giving his opinion that the bond was void, exclaiming in bad French, with more force than elegance, "And by G—, if the plaintiff were here, he should go to prison till he paid a fine to the king"; and says Parker, C. J., in giving his celebrated opinion in the leading case of *Mitchel v. Reynolds*, 1 P. Wms. 121, S. C., 1 Smith's Lead. Cas. *508: "I cannot but approve of the indignation that judge expressed, though not his manner of expressing it." But with the increase of population and trade, and the consequent greater competition in the useful pursuits, the rule was relaxed and modified. Ever since the case of *Mitchel v. Reynolds*, *supra*, the law, while still declaring certain contracts in restraint of trade to be void on the ground of public policy, as injuring the public by depriving it of the restricted party's industry, and injuring the party himself by precluding him from exercising his occupation, upheld other contracts on the same principle of public policy as in the best interests of trade to permit restrictions within certain reasonable limits.

Cases and text-books differ somewhat in their statement of the general rule as to the validity of contracts in restraint of trade. But from a consideration of all the authorities, especially in the light of modern cases, it may be formulated as follows: Contracts which impose an unreasonable restraint upon the exercise of a business, trade, or profession are void, but contracts in reasonable restraint thereof are valid: See 2 Addison on Contracts (Abbott's ed.), *1150; Bishop on Contracts, secs. 515, 516; Metcalf on Contracts, 232; 2 Parsons on Contracts, *748; Wharton on Contracts, secs. 430, 431; Benjamin on Sales, sec. 520; 2 Pomeroy's Eq. Jur., sec. 934; 1 Story's Eq. Jur., sec. 292; *Mitchel v. Reynolds*, 1 P. Wms. 121; S. C., 1 Smith's Lead. Cas. *508, and note; *Homer v. Ashford*, 11 Moore, 91; S. C., 3 Bing. 322; *Chesman v. Nainby*, 1 Brown Parl. C. 234; S. C. in king's bench, 2 Strange, 739; 2 Ld. Raym. 1456; *Wickens v. Evans*, 3 Younge & J. 318; *Horner v. Graves*, 7 Bing. 735; S. C., 5 Moore & P. 768; *Hitchcock v. Coker*, 6 Ad. & E. 438; S. C., 1 Nev. & P. 796; 2 Har. & W. 464; *Ward v. Byrne*, 5 Mees. & W. 548; S. C., 3 Jur. 1175; *Mallan v. May*, 11 Mees. & W. 653; S. C., 7 Jur. 536; 12 L. J. Ex. 376; *Pilkington v. Scott*, 15 Mees. & W. 657; S. C., 15 L. J. Ex. 329; *Leather Cloth Co. v. Lorrison*, L. R. 9 Eq. 345; S. C., 39 L. J. Ch. 86; 21 L. T. 661; 18 Week. Rep. 572; *Allopp v. Wheatcroft*, L. R. 15 Eq. 59; S. C., 42 L. J. Ch. 12; 27 L. T. 372; 21 Week. Rep. 102; *Catt v. Tourle*, L. R. 4 Ch. 654; S. C., 38 L.

J. Ch. 665; 21 L. T. 188; *Rousillon v. Rousillon*, L. R. 14 Ch. D. 351; S. C., 49 L. J. Ch. 338; 42 L. T. 679; 28 Week. Rep. 623; *Collins v. Locke*, L. R. 4 App. Cas. 674; S. C., 48 L. J. P. C. 68; 41 L. T. 292; 28 Week. Rep. 189; *California Steam Nav. Co. v. Wright*, 6 Cal. 259; S. C., 65 Am. Dec. 511; *Wright v. Ryder*, 36 Cal. 347; *Holmes v. Martin*, 10 Ga. 503; *Jenkins v. Temple*, 30 Id. 655; *Brewer v. Lamar*, 69 Id. 656; S. C., 47 Am. Rep. 766; *Bowser v. Bliss*, 7 Blackf. 344; S. C., 43 Am. Dec. 93; *Beard v. Dennis*, 6 Ind. 200; S. C., 63 Am. Dec. 380; *Duffy v. Shockey*, 11 Ind. 70; S. C., 71 Am. Dec. 348; *Wiley v. Baumgardner*, 97 Ind. 66; S. C., 49 Am. Rep. 427; *Linn v. Sigbee*, 67 Ill. 75; *Craft v. McConoughy*, 79 Id. 346; S. C., 22 Am. Rep. 171; *Talcott v. Brackett*, 5 Ill. App. 60; *Hedge v. Lowe*, 47 Iowa, 137; *Pike v. Thomas*, 4 Bibb, 486; S. C., 7 Am. Dec. 741, and note; *Guerand v. Dandole*, 32 Md. 561; S. C., 3 Am. Rep. 164; *Pierce v. Fuller*, 8 Mass. 223; S. C., 5 Am. Dec. 102; *Stearns v. Barrett*, 1 Pick. 443; S. C., 11 Am. Dec. 223, 227; *Palmer v. Stebbins*, 3 Pick. 188; S. C., 15 Am. Dec. 204; *Alger v. Thacher*, 19 Pick. 51; S. C., 31 Am. Dec. 119; *Caswell v. Gibbs*, 33 Mich. 331; *Perkins v. Clay*, 54 N. H. 518; *Eastern Express Co. v. Meserve*, 60 Id. 198; *Hoagland v. Segar*, 38 N. J. L. 230, 235; *Nobles v. Bates*, 7 Cow. 307; *Webb v. Noah*, 1 Edw. Ch. 604; *Chappel v. Brockway*, 21 Wend. 157; *Ross v. Sadgbeer*, 21 Id. 166; *Dunlop v. Gregory*, 10 N. Y. 241; S. C., 61 Am. Dec. 746; *Lawrence v. Kidder*, 10 Barb. 641; *Van Marter v. Babcock*, 23 Id. 633; *Detkels v. Tamsen*, 7 Daly, 354, 357; *Diamond Match Co. v. Roeber*, 35 Hun, 421; *Lange v. Werk*, 2 Ohio St. 519; *Keeler v. Taylor*, 53 Pa. St. 467; S. C., 91 Am. Dec. 221; *Gompers v. Rochester*, 56 Pa. St. 194; *Harkinson's Appeal*, 78 Id. 196; S. C., 21 Am. Rep. 9, 14; *West Virginia Transp. Co. v. Ohio River Pipe Line Co.*, 22 W. Va. 600; S. C., 46 Am. Rep. 527; *Kellogg v. Larkin*, 3 Pinn. 123; S. C., 3 Chand. 133; 56 Am. Dec. 164; *Laubenheimer v. Mann*, 17 Wis. 542; *Oregon Steam Nav. Co. v. Winsor*, 20 Wall. 64. Compare the California Civil Code, secs. 1673-1676.

This general rule, however, is obviously of but little practical use without some explanation of what is meant by a "reasonable restraint." In *Horner v. Graves*, 7 Bing. 735, S. C., 5 Moore & P. 768, Tindal, C. J., said: "We do not see how a better test can be applied to the question, whether reasonable or not, than by considering whether the restraint is such only as to afford a fair protection to the interests of the party in favor of whom it is given, and not so large as to interfere with the interests of the public. Whatever restraint is larger than the necessary protection of the party can be of no benefit to either: it can only be oppressive; and if oppressive, it is, in the eye of the law, unreasonable"; and in *Hitchcock v. Ocker*, 6 Ad. & E. 438, S. C., 1 Nev. & P. 796, 2 Har. & W. 464: "Where the restraint of a party from carrying on a trade is larger and wider than the protection of the party with whom the contract is made can possibly require, such restraint must be considered as unreasonable in law, and the contract which would enforce it must be therefore void." And see, to the same effect, *Ward v. Byrne*, 5 Mees. & W. 548; S. C., 3 Jur. 1175; *Mallam v. May*, 11 Mees. & W. 653; S. C., 7 Jur. 536; 12 L. J. Ex. 376; *Avery v. Langford*, 1 Kay, 663; S. C., 18 Jur. 905; 23 L. J. Ch. 837; *Leather Cloth Co. v. Lonsont*, L. R. 9 Eq. 345; S. C., 39 L. J. Ch. 86; 21 L. T. 661; 18 Week. Rep. 572; *Rousillon v. Rousillon*, L. R. 14 Ch. D. 351; S. C., 49 L. J. Ch. 338; 42 L. T. 679; 28 Week. Rep. 623; *Oregon Steam Nav. Co. v. Winsor*, 20 Wall. 64; *Chappel v. Brockway*, 21 Wend. 157, 162; *Ross v. Sadgbeer*, 21 Id. 166; *Dunlop v. Gregory*, 10 N. Y. 241; S. C., 61 Am. Dec. 746; *Diamond Match Co. v. Roeber*, 35 Hun, 421; *Detkels v. Tamsen*, 7 Daly, 354, 357; *Beal v. Chase*, 31 Mich. 90; *Wiley*

v. *Baumgardner*, 97 Ind. 66; S. C., 49 Am. Rep. 427; *Johnson v. Quinn*, 100 Ind. 466. And again the same learned jurist says: "No precise boundary can be laid down within which the restraint would be reasonable, and beyond which excessive": *Horner v. Graves*, *supra*; and "where the question turns upon the reasonableness or unreasonableness of the restriction of the party from carrying on trade or business within a certain space or district, the answer may depend upon various circumstances that may be brought to bear upon it, such as the nature of the trade or profession, the populousness of the neighborhood, the mode in which the trade or profession is usually carried on": *Hitchcock v. Coker*, 6 Ad. & E. 438; S. C., 1 Nev. & P. 796; 2 Har. & W. 464; see also *Bishop on Contracts*, sec. 517; *Chappel v. Brockway*, 21 Wend. 157, 162; *Dethlefs v. Tamsen*, 7 Daly, 354, 357; *Duffy v. Shockey*, 11 Ind. 70; S. C., 71 Am. Dec. 348, 350.

This question of the reasonableness of the restriction is one of law for the court: 1 Wharton on Contracts, sec. 433; *Bishop on Contracts*, sec. 517; *Benjamin on Sales*, sec. 527; 2 *Pomeroy's Eq. Jur.*, sec. 934; *Mallan v. May*, 11 Mees. & W. 653; S. C., 7 Jur. 536; 12 L. J. Ex. 376; *Wiley v. Baumgardner*, 97 Ind. 66; S. C., 49 Am. Rep. 427.

The time when the contract was entered into is alone looked to in determining whether a contract is reasonable or not. Thus it is said by Tindal, C. J., in *Rannie v. Irvine*, 7 Man. & G. 969, S. C., 8 Scott N. R. 674, 8 Jur. 1061, 14 L. J. Com. P. 10: "If the contract is a reasonable one at the time it is entered into, we are not bound to look out for improbable and extravagant contingencies in order to make it void"; and see, to the same effect, *Cook v. Johnson*, 47 Conn. 175; S. C., 36 Am. Rep. 64.

While courts do thus uphold and enforce contracts in reasonable restraint of trade, it has been said that their provisions should not be extended by construction beyond the fair and natural import of the language used: *Bowers v. Whittle*, 63 N. H. 147, 148; S. C., 56 Am. Rep. 499; *Haldeman v. Simonton*, 55 Iowa, 144, 146; *Roller v. Ott*, 14 Kan. 609; but see *post*, "Restraint as to Space." And again it has been said that a presumption exists against their validity, requiring persons seeking to enforce them to show that they were made upon a sufficient consideration, and that the restrictions they impose are reasonable: *Mitchel v. Reynolds*, 1 P. Wms. 181; S. C., 1 Smith's Lead. Cas. *508; *Horner v. Graves*, 7 Bing. 735; S. C., 5 Moore & P. 768; *Ward v. Byrne*, 5 Mees. & W. 548, 559; S. C., 3 Jur. 1175; *Mallan v. May*, 11 Mees. & W. 653; S. C., 7 Jur. 536; 12 L. J. Ex. 376; *Pierce v. Fuller*, 8 Mass. 223; S. C., 5 Am. Dec. 102; *Chappel v. Brockway*, 21 Wend. 157, 159; *Roes v. Sadgbeer*, 21 Id. 166; *Callahan v. Donnelly*, 45 Cal. 152, 154; S. C., 13 Am. Rep. 172, 173; *Talcott v. Brackett*, 5 Ill. App. 60; but in *Hubbard v. Miller*, 27 Mich. 15, S. C., 15 Am. Rep. 153, *Christiancy, C. J.*, makes the following observations: "The rule to be drawn from a careful analysis of the adjudged cases, and the reasons upon which they are founded, does not seem to us to involve any such presumption in the accurate or legal sense of the term; and may be more correctly stated to be that all contracts in restraint of trade are void, if considered only in the abstract, and without reference to the situation or objects of the parties, or other circumstances under or with reference to which they were made; and this, though the pecuniary consideration paid may have been sufficient to support the contract in any other aspect, or any ordinary contract for a legal purpose; or even though it may be sufficient in value to compensate the restraint imposed. But if, considered with reference to the situation, business, and objects of the parties, and in the light of all the surrounding circumstances with reference to which the contract was made,

the restraint contracted for appears to have been for a just and honest purpose, for the protection of the legitimate interests of the party in whose favor it is imposed, reasonable as between them, and not specially injurious to the public, the restraint will be held valid."

CONSIDERATION. — There must be an actual valuable consideration to support a contract in restraint of trade. A consideration is necessary, although the contract be under seal: Bishop on Contracts, sec. 126; Metcalf on Contracts, 233; 1 Wharton on Contracts, sec. 434; *Mitchel v. Reynolds*, 1 P. Wms. 181; S. C., 1 Smith's Lead. Cas. *506; *Davis v. Mason*, 5 Term Rep. 118; *Hutton v. Parker*, 7 Dowl. P. C. 739; *Pierce v. Fuller*, 8 Mass. 223; S. C., 5 Am. Dec. 102; and should be shown on the face of the declaration or complaint: *Hutton v. Parker*, 7 Dowl. P. C. 739; *Weller v. Hersee*, 10 Hun, 431. In fact, it is generally said that this is the only exception to the rule that a contract under seal imports a consideration which a party is not permitted to deny: See Metcalf on Contracts, sec. 233. It was at one time supposed that the consideration must be adequate: *Mitchel v. Reynolds*, *supra*; *Gale v. Reed*, 8 East, 80; *Young v. Timmins*, 1 Tyrw. 226; S. C., 1 Crompt. & J. 331; but this doctrine has long since been denied, and it is now settled that if there is a legal consideration, the courts will not inquire whether or not it is adequate, or in other words, equal in value to the restraint agreed upon: Metcalf on Contracts, 233; 1 Wharton on Contracts, sec. 434; Benjamin on Sales, sec. 526; *Hitchcock v. Coker*, 6 Ad. & E. 438; S. C., 1 Nev. & P. 796; 2 Har. & W. 464; *Archer v. Marsh*, 6 Ad. & E. 959; S. C., 2 Nev. & P. 562; Will., W. & D. 641; *Pilkington v. Scott*, 15 Mees. & W. 657; S. C., 15 L. J. Ex. 329; *Sainter v. Ferguson*, 7 Com. B. 716; S. C., 13 Jur. 828; 18 L. J. Com. P. 217; *Gravelly v. Barnard*, L. R. 18 Eq. 518; S. C., 43 L. J. Ch. 659; 30 L. T. 863; *Collins v. Locke*, L. R. 4 App. Cas. 674; S. C., 48 L. J. P. C. 68; 41 L. T. 292; 28 Week. Rep. 189; *Beard v. Dennis*, 6 Ind. 200; S. C., 63 Am. Dec. 390; *Pierce v. Fuller*, 8 Mass. 223; S. C., 5 Am. Dec. 102; *Guerand v. Dandeleit*, 32 Md. 561; S. C., 3 Am. Rep. 164, 168; *Linn v. Sigbee*, 67 Ill. 75; *Hulbard v. Miller*, 27 Mich. 15, 21; S. C., 15 Am. Rep. 153; *Lawrence v. Kidder*, 10 Barb. 641, 649; *McClurg's Appeal*, 58 Pa. St. 51. "It is enough," says Tindal, C. J., in *Hitchcock v. Coker*, *supra*, "that there is actually a consideration for the bargain, and that such consideration is a legal consideration, and of some value." In *Pierce v. Fuller*, *supra*, one dollar was held to be a sufficient consideration for a covenant not to run a stage-coach between Providence and Boston, in opposition to the plaintiff.

RESTRAINT AS TO TIME. — The question of time in the restriction is unimportant in determining whether a contract is void as being in restraint of trade. If the restraint is otherwise reasonable, the circumstance that it is indefinite in time will not affect its validity: 2 Addison on Contracts (Abbott's ed.), *1153; 1 Wharton on Contracts, sec. 432; Metcalf on Contracts, 232; Benjamin on Sales, sec. 525; *Hitchcock v. Coker*, 6 Ad. & E. 438; S. C., 1 Nev. & P. 796; 2 Har. & W. 464; *Pemberton v. Vaughan*, 10 Q. B. 87; S. C., 11 Jur. 411; 16 L. J. Q. B. 161; *Catt v. Tourle*, L. R. 4 Ch. 654; S. C., 38 L. J. Ch. 665; 21 L. T. 188; *Cook v. Johnson*, 47 Conn. 175; S. C., 36 Am. Rep. 64; *Goodman v. Henderson*, 58 Ga. 567; *Bowser v. Bliss*, 7 Blackf. 344; S. C., 43 Am. Dec. 93; and on the other hand, if the contract be unreasonable in other respects, a limitation as to time will not cure the illegality: Benjamin on Sales, sec. 525; *Ward v. Byrne*, 5 Mees. & W. 548; S. C., 3 Jur. 1175; *Wiley v. Baumgardner*, 97 Ind. 66; S. C., 49 Am. Rep. 427; *Lawrence v. Kidder*, 10 Barb. 641, 647; yet in *Proctor v. Sargent*, 2 Mass. & G. 20, S. C., 2 Scott N. R. 289, we find these observations of Tindal, C. J.:

"I think that when we are deciding upon the unreasonableness of a contract of this kind, we cannot leave out of consideration the duration of the restraint; for although I admit that where we once hold a restriction to be unreasonable in point of space, the shortness of the time for which it is imposed will not make it good, yet where the question is, whether the restraint is unreasonable or not in point of space, that which would be unreasonable were it to continue for any length of time may not be so when it is to last only for a day or two."

The restriction, if unlimited as to point of time, and otherwise reasonable, continues during the life of the promisor, although the promisee may have removed his business to another place, parted with his business, retired from business, or have died: *Hitchcock v. Coker*, 6 Ad. & E. 438; S. C., 1 Nev. & P. 796; 2 Har. & W. 464; *Hastings v. Whitely*, 2 Ex. 611; *Jacoby v. Whitmore*, 49 L. T. 335; S. C., 32 Week. Rep. 18; *Cook v. Johnson*, 47 Conn. 175; S. C., 36 Am. Rep. 64. But a stipulation by a person on being appointed an agent for the sale of wine and spirits, that he "shall not engage in, undertake, transact, or do any business in the same trades or business, or any or either of them, within ten miles of the town of Towcester, for himself or any other person or firm," is to be limited to the time the agent remained in the principal's service: *King v. Hansell*, 5 Hurl. & N. 106.

RESTRAINT AS TO SPACE. — By far the greater number of the cases involving the validity of contracts in restraint of trade deal with the question whether certain restrictions as to space or extent of territory are reasonable. Indeed, a common mode of stating the general rule was, that contracts in general restraint of a trade or profession are void, but contracts not to exercise a trade or profession in a particular place or within certain limits are valid. A general restraint of trade was understood to mean a restraint upon its exercise anywhere, or through the entire kingdom or state, or perhaps a considerable portion thereof. It will be seen that the principles heretofore stated have modified this once prevalent view. The whole question, according to the best considered modern authorities, depends upon the reasonableness of the restriction, as affording a fair protection to the interests of the party in favor of whom it is made. A contract restraining the exercise of a trade or business throughout the kingdom or state may be reasonable, and therefore valid: *Rousillon v. Rousillon*, L. R. 14 Ch. D. 351; S. C., 49 L. J. Ch. 338; 42 L. T. 679; 28 Week. Rep. 623; *Beal v. Chase*, 31 Mich. 490; *Diamond Match Co. v. Roeber*, 35 Hun, 421. Compare the extremely narrow and extraordinary provisions of the California Civil Code, secs. 1673-1675. Thus in *Beal v. Chase*, *supra*, an agreement by the vendor of a printing and publishing business, that so long as the vendee remained in the business at the place of sale, the vendor "will not, either directly or indirectly, engage in the business of printing and publishing in the state of Michigan," was held not to be an unreasonable restraint of trade, the business extending over substantially the whole territory of the state; and in *Diamond Match Co. v. Roeber*, *supra*, an agreement by the vendor of a business of manufacturing and selling matches not to engage, either directly or indirectly, in the manufacture or sale, or in any way or manner whatever be interested in the manufacture or sale, of friction matches within any of the states or territories of the United States or the District of Columbia, except the state of Nevada and the territory of Montana, was upheld as not being broader in its restraints than the business of the vendee required, the business extending over the whole country.

The following contracts have been held valid, as not imposing undue

restraints as to space: Not to engage in the practice of law in the town of Adel, Iowa: *Smalley v. Greene*, 52 Iowa, 241; S. C., 35 Am. Rep. 267; or to practice as an attorney or solicitor within fifty miles of Ely Place, London: *Galsworthy v. Strutt*, 1 Ex. 659; or in London, or within 150 miles thereof: *Bunn v. Guy*, 4 East, 190; or in London or the counties of Middlesex or Essex: *May v. O'Neill*, 44 L. J. Ch. 660; an agreement by a solicitor's clerk not to reside in the parish of Tormoham, England, or within twenty-one miles thereof, or carry on therein, or within that distance, any business of the description of that carried on under the agreement: *Dendy v. Henderson*, 11 Ex. 194; S. C., 24 L. J. Ex. 324; not to practice as a solicitor in any part of Great Britain: *Whittaker v. Howe*, 3 Beav. 383; but this case must be regarded as overruled; not to practice as a surgeon, apothecary, or man-midwife within ten miles of the town of Thetford, England: *Davis v. Mason*, 5 Term Rep. 118; or to set up business as such in the town of Aylesbury, or within twenty miles thereof: *Hayward v. Young*, 2 Chit. 407; or to practice as surgeon or apothecary at Stourport, or within ten miles thereof: *Hastings v. Whitley*, 2 Ex. 611; or at Macclesfield, or within seven miles thereof: *Sainter v. Ferguson*, 7 Com. B. 716; S. C., 13 Jur. 828; 18 L. J. Com. P. 217; or at Wellington, or within twelve miles thereof: *Reynolds v. Bridge*, 6 El. & B. 528; or within one mile from the parish church at Wadhurst: *Mercer v. Irving*, El. B. & E. 563; or within the parish of Newick, or ten miles thereof: *Gravelly v. Barnard*, L. R. 18 Eq. 518; S. C., 43 L. J. Ch. 649; 30 L. T. 863; not to practice as a physician at Douglas, Massachusetts: *Dwight v. Hamilton*, 113 Mass. 175; or in the village of Schuylerville or town of Saratoga, New York: *Mott v. Mott*, 11 Barb. 127; or within twelve miles of Chandlerville, Pennsylvania: *McClurg's Appeal*, 58 Pa. St. 51; or within twenty miles of another physician: *Butler v. Burleson*, 16 Vt. 176; not to practice medicine, surgery, or obstetrics in the town of Fairfield, Indiana, or within fifteen miles thereof: *Miller v. Elliott*, 1 Ind. 484; not to practice as a physician or surgeon in Maple Rapids, Michigan, and vicinity: *Doty v. Martin*, 32 Mich. 462; not to establish, or attempt to establish, a medical practice within the township of Chili, Illinois, or within six miles of the promisor's present residence: *Linn v. Sigbee*, 67 Ill. 75; not to practice as a physician in the county of Oswego, New York: *Holbrook v. Waters*, 9 How. Pr. 335; not to exercise the trade or business of a chemist and druggist in the town of Taunton, England, or within three miles thereof: *Hitchcock v. Coker*, 6 Ad. & E. 438; S. C., 1 Nev. & P. 796; 2 Har. & W. 464; to entirely discontinue a laboratory business on certain premises at the expiration of five years: *Grasselli v. Lowden*, 11 Ohio St. 349; an agreement by the proprietor of a newspaper, upon its sale, that he would not for eight years connect himself with or lend his name to or directly or indirectly write for any newspaper or periodical published in the city of New York, or in the city of Albany, or within eighty miles from the city of New York, except for the paper sold and another with which it was proposed to be united: *Webb v. Noah*, 1 Edw. Ch. 604; an agreement between three persons carrying on the trade of trunk and box makers by traveling into various parts of England to divide, and not to interfere, with certain districts of the country: *Wickens v. Evans*, 3 Younge & J. 318; not to be concerned in any trading establishment in a district comprising a considerable portion of the county of Cornwall, England: *Avery v. Langford*, 1 Kay, 663; S. C., 18 Jur. 905; 23 L. J. Ch. 837; an agreement by a person employed to travel for a mercantile house over a certain district of England designated as the "midland district," that in the event of his traveling for any other house in the same trade, "on any part of the

same ground," he would pay a certain penalty: *Mumford v. Gething*, 7 Com. B., N. S., 305; S. C., 6 Jur., N. S., 428; 29 L. J. Com. P. 105; 1 L. T. 64; 8 Week. Rep. 157; a contract "to retire from the business of purchasing in the Savannah market green hides, sheep skins and hides, and skins dried by butchers, forever": *Goodman v. Henderson*, 58 Ga. 567; not to be concerned directly or indirectly in the canvassing trade in London, and within 150 miles of the general post-office, in Liverpool and in Manchester: *Tallis v. Tallis*, 1 El. & B. 391; S. C., 17 Jur. 1149; 22 L. J. Q. B. 185; not to carry on the business of oil and color and Italian warehouseman within one mile from the promisee's shop: *Jacoby v. Whitmore*, 49 L. T. 335; S. C., 32 Week. Rep. 18; a sale of the exclusive right of "making, selling, and trading fanning-mills south of the Wabash River, within thirty miles of Marion, in Grant County, Indiana": *Bowser v. Bliss*, 7 Blackf. 344; S. C., 43 Am. Dec. 93; not to carry on the business of horse-hair manufacturer within two hundred miles of Birmingham, England: *Harms v. Parsons*, 32 Beav. 328; S. C., 9 Jur., N. S., 145; 33 L. J. Ch. 247; 7 L. T. 815; 11 Week. Rep. 250; not to carry on the business of a gas-meter maker and gas engineer within twenty miles of Great Peter Street, Westminster: *Clarkson v. Edge*, 33 Beav. 227; S. C., 10 Jur., N. S., 871; 33 L. J. Ch. 443; 12 Week. Rep. 518; not to engage in the business of iron casting within sixty miles of Calais, Maine: *Whitney v. Slayton*, 40 Me. 224; not to engage in the hardware business in Mexico, Missouri: *Gill v. Ferris*, 82 Mo. 156; or in Hillsborough, Illinois: *Stewart v. Challacombe*, 11 Ill. App. 379; or in the business of dealing in agricultural implements in Richmond, Indiana: *Beard v. Dennis*, 6 Ind. 200; S. C., 63 Am. Dec. 390; or in Winterset, Iowa, or vicinity: *Hedge v. Lowe*, 47 Iowa, 137; not to manufacture or sell, or become engaged in the business of manufacturing or selling, stoves or tinware in Danvers, Massachusetts: *Ropes v. Upton*, 125 Mass. 258; not to open a shop for the purpose of making and selling ginger beer within one mile of certain premises: *Pemberton v. Vaughan*, 10 Q. B. 87; S. C., 11 Jur. 411; 16 L. J. Q. B. 161; not to carry on the business of saddlery, harness-making, tanning, and currying within twenty miles of a certain shop: *Nobles v. Bates*, 7 Cow. 307; or the business of saddler within ten miles from the town hall in Croydon, England: *Jones v. Heavens*, L. R. 4 Ch. D. 636; S. C., 25 Week. Rep. 460; not to erect or carry on a tan-yard in the town of Morganfield or county of Union, Kentucky: *Grundy v. Edwards*, 7 J. J. Marsh. 368; S. C., 23 Am. Dec. 409; not to carry on the horseshoeing business in Germantown, Pennsylvania, or vicinity: *Carroll v. Hickes*, 10 Phila. 308; not to start or run a livery-stable on certain premises, or permit the premises to be used for such purpose: *Johnson v. Guinn*, 100 Ind. 466; not to open a photographic gallery, or work in the capacity of photographer, in Charlotte, North Carolina: *Baumgarten v. Broadway*, 77 N. C. 8; not to carry on the business of a dyer or scourer in Baltimore, Maryland: *Guerand v. Dandeleit*, 32 Md. 561; S. C., 3 Am. Rep. 164; not to engage in the furniture business within two miles of certain premises: *Arnold v. Kreutzer*, 67 Iowa, 214; S. C., 25 N. W. Rep. 139; not to carry on the business of a tailor "within twenty miles from the Standard on Cornhill": *Rolfe v. Rolfe*, 15 Sim. 88; not to engage in the millinery or dress-making business in Felicity, Ohio, "or at any place within such distance of said town as will interfere with said business": *Morgan v. Perhamus*, 36 Ohio St. 517; S. C., 38 Am. Rep. 607; not to set up or exercise the trade of a linen draper within half a mile of the dwelling-house of the other party to the agreement, in Drury Lane, or of any other house that she, her executors or administrators, shall think proper to remove to: *Cheesman v. Nainby*, 1 Brown Parl. C. 234; S. C.,

in king's bench, 2 Strange, 739; 2 Ld. Raym. 1456; not to carry on the business of a publican within a mile of certain premises: *Oriedes v. Bolton*, 3 Car. & P. 240; an agreement by a vendor in selling land for a tavern stand to discontinue his tavern within half a mile of the land sold: *Heichew v. Hamilton*, 3 G. Greene, 596; not to sell intoxicating liquors in the town of Martinsville, Indiana, or within one mile thereof: *Harrison v. Lockhart*, 25 Ind. 112; or in the town of Windfall, or township of Wildcat, Indiana: *McAlister v. Howell*, 42 Id. 15; not to manufacture or sell intoxicating liquors within the county of Wells, Indiana: *Studabaker v. White*, 31 Id. 211; not to engage in the grocery business within a limited distance in Boston: *Pierces v. Woodward*, 6 Pick. 206; or to carry it on in Spring Place, Georgia: *Jenkins v. Temple*, 39 Ga. 655; or in Camilla, Georgia: *Ellis v. Jones*, 56 Id. 504; not to carry on the business of a butcher within five miles from certain premises: *Elles v. Croft*, 10 Com. B. 241; S. C., 14 Jur. 855; 19 L. J. Com. P. 385; or in Danbury, New Hampshire, or vicinity: *Perkins v. Clay*, 54 N. H. 518; not to sell beef in New Orleans: *Wink v. Vogt*, 3 La. Ann. 16; or meat of any description in New Orleans: *Verges v. Forshee*, 9 Id. 294; or meat in Havilah, California: *Lightner v. Menzel*, 35 Cal. 452; not to carry on the business of a baker in the parish of St. Andrews, Holborn, England: *Müchel v. Reynolds*, 1 P. Wms. 181; S. C., 1 Smith's Lead. Cas. *508; or in the town of Fitchburg, Massachusetts: *Boutelle v. Smith*, 116 Mass. 111; not to carry on the business of a milkman within three miles of a certain street in London: *Bennell v. Inne*, 24 Beav. 307; S. C., 26 L. J. Ch. 663; or that of a cow-keeper within five miles of Northampton Square, in the county of Middlesex: *Proctor v. Sargent*, 2 Man. & G. 20; S. C., 2 Scott N. R. 289; not to be concerned in the coaching business between Reading and London: *Williams v. Williams*, 2 Swanst. 253; not to run opposition to the plaintiff's stage on a particular road between Boston and Providence: *Pierce v. Fuller*, 8 Mass. 223; S. C., 5 Am. Dec. 102; an agreement between partners in the business of running a stage-coach daily at certain hours between London and Croyden, that in the event of dissolution, and so long as the plaintiff should continue to carry on the trade of a coach proprietor at Croyden, the defendant should not carry on the business on any part of the road over which the coach was appointed to run within one hour before or after certain hours of the day: *Leighton v. Wales*, 3 Mees. & W. 545; a covenant by carriers to relinquish a certain portion of their carrying trade, and abstain from exercising it within certain limits: *Archer v. Marsh*, 6 Ad. & E. 959; S. C., 2 Nev. & P. 562; Will, W. & D. 641; an agreement not to run a steamboat purchased above a certain village on the Hudson River: *Dunlop v. Gregory*, 10 N. Y. 241; S. C., 61 Am. Dec. 746; not to own, run, or be interested in any line of packets on the Erie Canal from Rochester to Buffalo: *Chappel v. Brockway*, 21 Wend. 157; a contract whereby it is agreed that A shall cease to have any concern in the business of boating on the Connecticut River, and shall give B all the freighting of his goods up and down the river at the customary freight, and shall aid and countenance B in his business, and shall not directly or indirectly promote any other boatman to compete with B in the business of boating: *Palmer v. Stebbins*, 3 Pick. 188; S. C., 15 Am. Dec. 204; not to be interested in any voyage to the northwest coast of America, or in any traffic with the natives of that coast: *Perkins v. Lyman*, 9 Mass. 522; not to permit any boat in which the promisor was interested to navigate the navigable waters of California: *California Steam Navigation Co. v. Wright*, 6 Cal. 258; S. C., 65 Am. Dec. 511; to the same effect, see *Oregon Steam Navigation Co. v. Winsor*,

20 Wall. 64; *contra*: *Wright v. Ryder*, 36 Cal. 347; *Oregon Steam Navigation Co. v. Hale*, 1 Wash. 283; S. C., 34 Am. Rep. 803.

While the following contracts have been held to be void: Not to practice as a surgeon dentist within one hundred miles of the city of York, England: *Horner v. Graves*, 7 Bing. 735; S. C., 5 Moore & P. 768; by a workman not to engage in the trade of manufacturing printers' rollers and composition "either in the city of New York or at any point within a radius of 250 miles therefrom": *Bingham v. Maigne*, 20 Jones & S. 90; not to engage in the trade or business of manufacturing shoe-cutters at any place within the commonwealth of Massachusetts: *Taylor v. Blanchard*, 13 Allen, 370; S. C., 90 Am. Dec. 203; to discontinue manufacturing, trading, selling, or in any manner or form interfering with the manufacture of palm-leaf beds or mattresses, or in the materials out of which such beds are made, in the state of New York, west of the city of Albany: *Lawrence v. Kidder*, 10 Barb. 641; a covenant by the lessor of a brewery that he will not, during the continuance of the demise, "exercise or carry on the trade or business of a brewer, or merchant or agent for the sale of ale, beer, or porter, in Sheffield or elsewhere, or in any manner howsoever be concerned in the said trade or business": *Hinde v. Gray*, 1 Man. & G. 195; S. C., 1 Scott N. R. 123; 4 Jur. 392; a contract not to engage in the manufacture of a certain yeast powder, "nor in any branch of the yeast-powder business": *Callahan v. Donnelly*, 45 Cal. 152; S. C., 13 Am. Rep. 172; a bond which excludes the obligor from engaging in the trade of iron-founder everywhere and for all time: *Alger v. Thacher*, 19 Pick. 51; S. C., 31 Am. Dec. 119; an agreement not to follow or be employed in the business of a coal merchant for nine months after the promisor should leave the promisee's service: *Ward v. Byrne*, 5 Mees. & W. 548; S. C., 3 Jur. 1175; "not to engage in the dry-goods business for a term of five years": *Wiley v. Baumgardner*, 97 Ind. 66; S. C., 49 Am. Rep. 427; not to carry on the business of innkeeper within ten years: *Mossop v. Mason*, 18 Grant Ch. 453; not to run or employ, or suffer to be run or employed, a certain steamboat purchased, upon any of the routes of travel of the waters of California: *Wright v. Ryder*, 36 Cal. 347; or in any of the waters of Oregon, California, and many of the navigable waters of Washington Territory: *Oregon Steam Navigation Co. v. Hale*, 1 Wash. 283; S. C., 34 Am. Rep. 803; but see *California Steam Navigation Co. v. Wright*, 6 Cal. 259; S. C., 65 Am. Dec. 511; *Oregon Steam Navigation Co. v. Winsor*, 20 Wall. 64. The small number of cases in which contracts imposing a restriction upon the exercise of a profession, trade, or business, in point of space, have been declared invalid, as compared with the number in which the contracts have been sustained, will at once be remarked. Several of the above cases in which the contracts were held to be objectionable, even, are open to criticism and are more than doubtful. For further illustrations, see *post*, "Divisibility of Contracts in Restraint of Trade."

The somewhat strict construction which some cases have seemed inclined to give contracts in restraint of trade has been noticed. Yet other cases appear to apply the same principles of construction to this class of contracts as to any other. "All contracts should be construed according to the intention of the parties": *Hubbard v. Miller*, 27 Mich. 15; S. C., 15 Am. Rep. 153. The following will show how some courts have construed certain restrictions as to space: An agreement by a retiring partner to discontinue the retail trade of boots and shoes, while the remaining partner remained in the trade, was construed to mean that he would discontinue the trade at the town where the firm carried on business, and the agreement was therefore upheld: *Artis v. Gokey*, 68 N. Y. 300; and in *Hubbard v. Miller*, *supra*, where per-

sons who were engaged at Grand Haven, Michigan, in the business of sinking drive-wells, and keeping and selling the materials therefor, agreed to sell the business and stock to another, who was engaged in the same business at the same place, and not "to keep well-drivers' tools or fixtures, and not to engage in the business of well-driving after this date," it was held that the restriction must be construed to impose a restraint upon the carrying on of such business at Grand Haven, and within such limits about that city as this business there would naturally and reasonably embrace, and not such a general restraint of trade as to be void; so where a physician sells his "good-will of practice as surgeon and physician at and in the neighborhood of the town of Lisbon," Maryland, and agrees "to quit the said practice" in favor of the purchaser, the restriction is to be limited to Lisbon and vicinity, and is therefore valid: *Warfield v. Booth*, 33 Md. 63; and an agreement by a retiring partner with the remaining partner, upon the sale of the good-will of the business, "not to injure said sale by any actions whatever," was held to mean not to engage in any business in opposition to that carried on by the continuing partner; and as the agreement only provided for a fair protection to the latter, it was valid: *Dethlefs v. Tamsen*, 7 Daly, 354.

It is not within the limits of this note to discuss what acts do and what acts do not amount to breaches of agreements in restraint of trade, when such agreements are held or assumed to be valid. Yet attention may be called to the following cases in this connection: Where a physician sold his medical practice to another, and agreed not to "resettle" in the same town, it was held that he was bound thereby not to again take up his residence there for the purpose of practicing his profession, but that he might practice in the town and its vicinity, while residing elsewhere: *Haldeman v. Simonton*, 55 Iowa, 144. An agreement between physicians that one would not practice in a certain city "and vicinity" was construed as excluding him from all territory within ten miles from the city limits: *Timmerman v. Dever*, 52 Mich. 34; S. C., 50 Am. Rep. 240. In *Cook v. Johnson*, 47 Conn. 175, S. C., 36 Am. Rep. 64, a contract not to practice dentistry "within a radius of ten miles of Litchfield" was held to mean "within ten miles of the center of the village of Litchfield," the town of Litchfield having an extensive territory, and containing the village of Litchfield, in which the promisor dwelt, and had his office at the time, and where the contract was drawn and executed.

In some cases the courts have been called upon to solve the problem how the distance should be measured. Thus in an early *nisi prius* case, where one agreed not to carry on the trade of a cheese-monger within the distance of one mile from the plaintiff's shop, Lord Ellenborough held the shortest way of access by footpath to be the proper line of admeasurement: *Woods v. Dennett*, 2 Stark. 89; and afterwards, in *Leigh v. Hind*, 9 Barn. & C. 774, S. C., 4 Man. & R. 579, in a covenant not to keep a public house within half a mile of premises assigned, it was held that the distance was to be estimated by the nearest mode of access at the time of the covenant; but Baron Parke was of the opinion that the measurement should be "as the crow flies." Still later, in *Duignan v. Walker*, Johns. 446, S. C., 5 Jur., N. S., 976, 28 L. J. Ch. 867, 7 Week. Rep. 562, under a contract not to practice as an attorney within seven miles of the plaintiff's offices, it was held that the distance was to be measured in a straight line upon a horizontal plane, and not by the nearest practicable mode of access; and again, finally, where the defendant covenanted not to carry on the business of a publican within half a mile of the plaintiff's premises, it was decided that the proper mode of admeasurement was in a straight line on the map, "as the crow flies," and

not by the nearest mode of practicable access: *Moufet v. Cole*, L. R. 8 Ex. 32; S. C., 42 L. J. Ex. 8; 27 L. T. 678; 21 Week. Rep. 175. Parties may, of course, provide that the distance shall be differently measured: See *Athyns v. Kimmier*, 4 Ex. 776, S. C., 19 L. J. Ex. 132, in which case the distance was to be "measured by the usual streets or ways of approach," which was held to mean not the most frequented public ways, but any of the usual public ways.

MISCELLANEOUS CASES OF RESTRAINTS. — Besides the numerous contracts in which the restraint as to carrying on a profession, trade, or business is in terms as to space or extent of territory, other contracts purport in terms to place a restriction as to dealing with persons rather than in place. Here, also, the test of reasonableness prevails. Thus in *Rannie v. Irvine*, 7 Man. & G. 969, S. C., 8 Scott N. R. 674, 8 Jur. 1051, 14 L. J. Com. P. 10, an agreement by the assignor of a lease and good-will of a business, that he would not, during the term assigned, "solicit the custom of, or knowingly supply bread or flour to any of the customers then dealing at the said premises," without the consent of the assignee, was held not void as an unreasonable restraint of trade; and see also *Galsworthy v. Strutt*, 1 Ex. 659; *Reynolds v. Bridge*, 6 El. & B. 528; *May v. O'Neill*, 44 L. J. Ch. 660, in which the restrictions were both as to space and persons.

A large number of cases have also been decided in which the contracts involved, while imposing a restraint upon trade, can hardly be said to place restrictions as to space or persons within the meaning of the foregoing cases.

In *Pilkington v. Scott*, 15 Mees. & W. 657; S. C., 15 L. J. Ex. 329; and in *Hartley v. Cummings*, 5 Com. B. 247; S. C., 12 Jur. 57; 17 L. J. Com. P. 84, — contracts by persons to serve another exclusively for a certain time were held not objectionable as in restraint of trade; and in *Wallis v. Day*, 2 Mees. & W. 273, S. C., 1 Jur. 73, a covenant by a carrier on the sale of his business not to thenceforth exercise the business of a carrier during his life, except as an assistant to the covenantees, was held not illegal as in restraint of trade, because the covenantor was not absolutely restrained from carrying on his trade, but only from carrying it on in any other way than as an assistant to the covenantees. And it might here be noticed that a contract with the proprietors of a theater not to write dramatic pieces for any other theater is legal, not resembling a contract restraining trade generally: *Morris v. Colman*, 18 Ves. 437; so where the defendant contracted that she would sing at the plaintiff's theater during a certain time, and would not sing elsewhere without the plaintiff's permission, the violation of the negative stipulation was restrained: *Lumley v. Wagner*, 1 De Gex, M. & G. 604; S. C., 13 Eng. L. & Eq. 252; 21 L. J. Ch. 898; and see *Montague v. Flockton*, L. R. 16 Eq. 189; S. C., 28 L. T., N. S., 381.

An agreement by the vendor, upon the sale of all the oil of peppermint which he should produce for two years, to otherwise discontinue the production of the oil for that time, not to dispose of any peppermint roots to any person, and not to distill for any other person peppermint oil, or rent or dispose of his distillery, or the use of it, for the purpose of manufacturing the oil, for two years, is valid: *Van Marter v. Babcock*, 23 Barb. 633; and an agreement by the defendant with the plaintiffs not to pay for lead ore taken from the plaintiffs' land, or elsewhere, more than the plaintiffs were paying, and to sell all ore purchased by him to the plaintiffs at a certain price, is not objectionable as a contract in restraint of trade: *Long v. Towd*, 42 Mo. 545; nor is a contract by which one party agrees to manufacture for another a certain number of barrels of lime within a given time at a certain price,

and not to sell to any other person any lime during the continuance of the agreement illegal as in restraint of trade: *Schoalm v. Holmes*, 49 Cal. 665; so an agreement by the vendee of a slave not to sell the slave out of a certain county, or in any of the southern states, or so as to separate him from his wife, or if he is sold, that he shall be sold to the vendor at his value, or at an agreed price, is valid: *Turner v. Johnson*, 7 Dana, 435.

An agreement by one person not to sell mineral teeth to any other than the promisee in the place where the promisee resided is valid: *Clark v. Crosby*, 37 Vt. 188; so is a contract by which one party agrees not to sell any furniture in a certain town to any person except the other: *Roller v. Ott*, 14 Kan. 609. An agreement not to put up "cemented hams of any kind" during the existence of the promisee's patent is not void as in restraint of trade: *Billings v. Ames*, 32 Mo. 265; nor is an agreement to furnish a party with sewing-machines at a discount, and upon credit, which provides that such party shall deal exclusively in the machine sold, and to purchase the same from the promisee exclusively: *Brown v. Rounsavell*, 78 Ill. 589; nor is a covenant by the licensee for a term of years of patented improvements in machinery for slubbing fibrous substances not to vend any slubbing-frames whatever without the invention applied to them: *Jones v. Lees*, 1 Hurl. & N. 189; 8 C. C., 2 Jur., N. S., 645; 26 L. J. Ex. 9; but a covenant by a clerk and traveler with a firm of brewers that he would not, during his service, or within two years afterwards, "either directly or indirectly sell, procure orders for the sale, or recommend, or be in any wise concerned or employed in the sale or recommendation, either on his own account or for any other person or persons, or public company or corporation, of any Burton ale or beer or porter, or of any ale or beer or porter brewed at Burton, or offered for sale as such, other than the ale or beer or porter brewed by said firm," was held void as unnecessarily extensive: *Allsopp v. Wheatcroft*, L. R. 15 Eq. 59; 8 C. C., 42 L. J. 12; 27 L. T. 372; 21 Week. Rep. 102. An agreement by a railroad company never to employ any other than a certain ferry for transportation at a certain point is not objectionable as a contract in restraint of trade: *Wiggins Ferry Co. v. Chicago etc. R. R.*, 73 Mo. 399; 8 C. C., 39 Am. Rep. 519; so an agreement by the directors of a railway company, who had leased land with the privilege of using docks, to pay shipping dues, not only for goods actually brought along the railway and shipped at those docks, but for goods brought along the railway to be shipped at other docks, is not in restraint of trade: *Taff Vale Ry v. Macnabb*, L. R. 6 H. L. 169; 8 C. C., 42 L. J. Q. B. 153; 22 Week. Rep. 65.

A covenant that the plaintiff, renting a stall from the defendants, should have the exclusive right to exhibit and sell certain specified classes of goods in the building, was sustained in *Altman v. Royal Aquarian Society*, L. R. 3 Ch. D. 228; and a covenant by the grantees of land that the grantor should have the exclusive right of supplying beer to any public house erected on the land was held not to be an unreasonable restraint of trade, in *Catt v. Tourle*, L. R. 4 Ch. 654; 8 C. C., 38 L. J. Ch. 665; 21 L. T. 188. Contracts between railroad and telegraph companies, by which the latter are given the exclusive right of establishing telegraphic lines along the roads of the former, have generally been held to be open to the objection of placing a restriction upon trade: *Western Union Tel. Co. v. Burlington etc. Ry*, 3 McCrary, 130; 8 C. C., 11 Fed. Rep. 1; *Western Union Tel. Co. v. Baltimore etc. Tel. Co.*, 23 Id. 12; *Baltimore etc. Tel. Co. v. Western Union Tel. Co.*, 24 Id. 319; *Western Union Tel. Co. v. American Union Tel. Co.*, 65 Ga. 160; 8 C. C., 38 Am. Rep. 781; contra, *Western Union Tel. Co. v. Atlantic etc. Tel. Co.*, 7 Biss. 367; *Western Union*

Tel. Co. v. Chicago etc. R. R., 86 Ill. 246. So in *West Virginia Transportation Co. v. Ohio River Pipe Line Co.*, 22 W. Va. 600, S. C., 46 Am. Rep. 527, an agreement by which an exclusive right of way was granted through a tract of land for the transportation of oil was held invalid. A restriction upon the sale of a town lot, that it should not be used as a tavern, was held valid in *Holmes v. Martin*, 10 Ga. 503; and an agreement by a grantee not to sell any spirituous liquors in the lots conveyed in less quantity than half a barrel was sustained in *Laubenheimer v. Mason*, 17 Wis. 542. But a covenant by a grantor that neither he, his heirs, nor assigns would sell any marl from off the premises adjoining the tract conveyed was declared void, as being in general restraint of trade: *Brewer v. Marshall*, 19 N. J. Eq. 537.

Contracts between producers or dealers for the purpose of controlling the market and enhancing the price of a certain commodity, have been held to be objectionable as in restraint of trade, although perhaps void for other reasons of public policy: *Morris's Run Coal Co. v. Barclay Coal Co.*, 68 Pa. St. 173; S. C., 8 Am. Rep. 159; *Arnot v. Pittston etc. Coal Co.*, 68 N. Y. 558; S. C., 23 Am. Rep. 190; *Craft v. McConoughy*, 79 Ill. 346; S. C., 22 Am. Rep. 171; *Central Ohio Salt Co. v. Guthrie*, 35 Ohio St. 666; *India Bagging Association v. Koch*, 14 La. Ann. 168; but see certain contracts sustained in *Kellogg v. Larkin*, 3 Pinn. 123; S. C., 3 Chand. 133; 56 Am. Dec. 184; *Skrainka v. Scharringhausen*, 8 Mo. App. 522; so a contract between railroad companies to apportion the country between themselves, and to refuse to enter into or allow business relations with competing lines, constructed or to be constructed, was declared void in *Denver etc. R. R. v. Atchison etc. R. R.*, 4 McCrary, 325; S. C., 15 Fed. Rep. 650; but where the object of an agreement was to parcel out the stevedoring business of a particular port among the parties to the agreement, and so prevent competition, at least among themselves, and also, perhaps, keep up the price of work, the agreement was held not invalid, if carried into effect by provisions reasonably necessary for the purpose, although the effect might be to create a partial restraint upon the power of the parties to exercise their trade: *Collins v. Locke*, L. R. 4 App. Cas. 674; S. C., 48 L. J. P. C. 68; 41 L. T. 292; 28 Week. Rep. 189.

General or unlimited restrictions as to the use of patent rights or the transfer of exclusive privileges thereto are not within the principle that contracts in general restraint of trade are void: 1 Wharton on Contracts, sec. 436; *Leather Cloth Co. v. Lonsont*, L. R. 9 Eq. 345; S. C., 39 L. J. Ch. 86; 21 L. T. 661; 18 Week. Rep. 572; *Printing etc. Co. v. Sampson*, L. R. 19 Eq. 462; S. C., 44 L. J. Ch. 706; 32 L. T. 354; 23 Week. Rep. 463; *Stearns v. Barrett*, 1 Pick. 143; S. C., 11 Am. Dec. 223; *Morse Twist Drill etc. Co. v. Morse*, 103 Mass. 73; S. C., 4 Am. Rep. 513; *Mackinnon Pen Co. v. Fountain Ink Co.*, 16 Jones & S. 442. So the sale of a trade secret with an unlimited restriction upon the vendor as to its use is perfectly valid: 2 Addison on Contracts (Abbott's ed.), *1152; 1 Story's Eq. Jur., sec. 292; *Bryson v. Whitehead*, 1 Sim. & St. 74; *Leather Cloth Co. v. Lonsont*, *supra*; *Hagg v. Darley*, 47 L. J. Ch. 587; S. C., 38 L. T. 312; *Jarvis v. Peck*, 10 Paige, 118, affirming 1 Hoff. Ch. 479; *Alcock v. Giberton*, 5 Duer, 76; *Hard v. Seeley*, 47 Barb. 428; *Vickery v. Welch*, 19 Pick. 523; *Taylor v. Blanchard*, 13 Allen, 370, 373; S. C., 90 Am. Dec. 203, 206; *Peabody v. Norfolk*, Mass. 452, 460; *Morse Twist Drill etc. Co. v. Morse*, *supra*; *Brewer v. Lamar*, 69 Ga. 656; S. C., 47 Am. Rep. 766; *Gills v. Hall*, 2 Brewst. 342.

A bond given by one person to another conditioned that a third person shall not engage in a particular business is not void as being in restraint of trade: *Presbury v. Fisher*, 18 Mo. 50; so an agreement by one physician, upon

transferring his practice and good-will to another, that "no other physician for the space of four years will establish himself in this place as a competitor, unless the increased population of the place should warrant it, or unless the purchaser should commit some act which shall forfeit to him the confidence of the community," and that if such competitor do so establish himself, the seller will repay the sum paid, is likewise not void: *Gilman v. Dwight*, 13 Gray, 356; S. C., 74 Am. Dec. 634. An agreement by certain persons to furnish the trade of their miners and workmen to others was also upheld in *George v. East Tennessee Coal Co.*, 15 Lea, 455; S. C., 54 Am. Rep. 425; but a somewhat similar contract was declared void in *Crawford v. Wick*, 18 Ohio St. 190.

DIVISIBILITY OF CONTRACTS IN RESTRAINT OF TRADE. — Where the stipulations in a contract in restraint of trade are divisible, and a part impose reasonable and a part unreasonable restraints upon trade, the courts will give effect to the former, and not to the latter: *Beard v. Dennis*, 6 Ind. 200; S. C., 36 Am. Dec. 380. Thus an agreement by a retiring partner not to carry on the trade of a perfumer "within the cities of London or Westminster, or within the distance of six hundred miles from the same respectively," was held divisible, and good as to the cities of London and Westminster, though void as to the rest: *Price v. Green*, 16 Mees. & W. 346; S. C., 16 L. J. Ex. 108, affirming *Green v. Price*, 13 Mees. & W. 695; S. C., 9 Jur. 857; 14 L. J. Ex. 105; so a covenant that the defendant would not, after the expiration of his term of service with the plaintiffs, carry on the profession of a surgeon dentist "in London, or any of the towns or places in England or Scotland where the plaintiffs, or the defendant on their account, might have been practicing before the expiration of the said service," is valid as far as London is concerned, but void as to the "towns or places in England and Scotland": *Mallan v. May*, 11 Mees. & W. 653; S. C., 7 Jur. 536; 12 L. J. Ex. 376; and an agreement not to establish or be connected, directly or indirectly, with any person in the star-candle or stearine business, or in the manufacture of the same, "at any place within the county of Hamilton, in the state of Ohio, or at any other place whatsoever in the United States of America," is divisible; and while it may be good as to the "county of Hamilton," it is not as to the "United States of America": *Lange v. Werk*, 2 Ohio St. 519; so an agreement not to engage in, or furnish information to others in regard to, the business of manufacturing daguerreotype and ambrotype materials within the county of Worcester, or within the United States, was similarly construed in *Dean v. Emerson*, 102 Mass. 480; and a contract not to engage in the business of manufacturing matches "at St. Louis or any other place" was also held to be divisible, and the restriction imposed as to St. Louis to be reasonable and valid: *Peltz v. Eichelle*, 62 Mo. 171; so an agreement by a retiring partner not to enter into or be concerned in the kind of business carried on by the firm, in the city of Cincinnati, and not to interfere or compete with any agency which might be established elsewhere by the remaining partner, was also held to be divisible, and reasonable and proper as to the city of Cincinnati, but void as to the rest: *Thomas v. Miles's Adm'r*, 3 Ohio St. 274; and a covenant that the defendant should not, during his term of service, or at any time after its expiration, directly or indirectly interfere or intermeddle with, or be concerned as attorney, agent, or otherwise, for any person who had already been, or who should from time to time thereafter become or be, the client or correspondent of the plaintiff, or his partner or partners, or assignees, and that the defendant should not act as partner, clerk, or assistant with or to any person who should interfere with or meddle therewith, is likewise divisible, and good

in respect of persons who had been the covenantee's clients before and at the time of making the deed: *Nicholls v. Stretton*, 10 Q. B. 346; S. C., 11 Jur. 1008; but an agreement never to engage in a certain business "in the city and county of San Francisco, or state of California," was held, in opposition to other cases, not a severable contract; and being in total restraint of trade, and therefore void, so far as it related to the whole state, was entirely void: *More v. Bonnet*, 40 Cal. 251; S. C., 6 Am. Rep. 621.

THE PRINCIPAL CASE IS CITED in *Dwight v. Hamilton*, 113 Mass. 178, to the point that the sale of the practice and good-will of a physician within certain limits is the legitimate subject-matter of a contract, and carries with it the implied covenant that the vendor will not himself do anything to disturb or injure the vendee in the enjoyment of that which he purchased; in *Ropes v. Upton*, 125 Id. 259, to the point that when a party has sold to another all his interest and good-will in a particular business, and has agreed not to carry on the same business in the same place, a court of equity will prevent him by injunction from violating his agreement; in *Munsey v. Butterfield*, 133 Mass. 494, it is quoted to the effect that the good-will of a trader is the benefit or advantage which accrues to him, in addition to the value of his property, derived from his reputation for promptness, fidelity, and integrity in his transactions, from his mode of doing business, and other incidental circumstances, in consequence of which he has acquired general patronage from constant and habitual customers; in *Dwight v. Hamilton*, 113 Id. 175, 179, it is cited to the point that a contract by a physician not to practice in a certain town is not illegal as being an undue restraint of trade; and in *Boutelle v. Smith*, 116 Id. 114, and *Munsey v. Butterfield*, 133 Id. 495, as showing what acts amount to a breach of an agreement to interfere with a business sold.

WOODS v. KEYES.

[14 ALLEN, 236.]

MILLINER'S CLOCK, STOVE, SCREEN, PITCHER, AND TABLE-COVER ARE EXEMPT FROM ATTACHMENT, under the General Statutes of Massachusetts, c. 133, sec. 32, cl. 5, if they are necessary to her business, are in actual use, and do not exceed one hundred dollars in value.

QUESTION IS ONE OF FACT FOR JURY WHETHER ARTICLES ARE "NECESSARY" FOR CARRYING ON MILLINER'S BUSINESS, under the General Statutes of Massachusetts, c. 133, sec. 32, cl. 5, which exempts from attachment the tools, implements, and fixtures necessary for carrying on the trade or business of the debtor, not exceeding one hundred dollars in value.

PRIVILEGE OF CLAIMING ARTICLES AS EXEMPT FROM ATTACHMENT IS NOT WAIVED by the debtor's neglect to claim them when attached by the officer, if they are plainly distinguishable as articles which are exempt.

TESTIMONY OF DECEASED WITNESS AT FORMER TRIAL IS NOT ADMISSIBLE unless the whole of it is proved.

TORT by Mary J. Woods against John S. Keyes, formerly a sheriff, to recover damages for the act of one Shed, a deputy, in attaching a clock, stove, screen, pitcher, and table-cover,

belonging to the plaintiff, and claimed by her to be exempt from attachment as tools, implements, and fixtures necessary for carrying on her business as a milliner. Shed was a witness at a former trial of the action before one Bonney, as auditor; and having since died, the defendant called Bonney to prove Shed's testimony, but Bonney was unable to state either Shed's language or the substance of it. The court excluded Bonney's testimony, upon the plaintiff's objection. There was evidence to show that Shed told the plaintiff she might take anything that was not attachable, and that the plaintiff never demanded or claimed any of the articles above named. The defendant asked the court to rule that the articles were not exempt from attachment; and if exempt, the plaintiff had waived her privilege by neglecting to claim them as exempt when attached by the officer. The judge declined so to rule; but ruled that the articles were such that if the jury were satisfied they were necessary in the plaintiff's business as a milliner, and in actual use by her, they would find the value of the articles from the evidence; and that it was not necessary for the plaintiff to prove a demand, or pointing out of the tools and implements, in order to sustain the action, but it was sufficient if they were plainly distinguishable as tools and implements of the plaintiff's trade. The plaintiff had a verdict, and the defendant alleged exceptions.

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T. Wentworth, for the plaintiff.

W. P. Webster, for the defendant.

By Court, CHAPMAN, J. 1. The defendant contends that the presiding judge submitted to the jury, as a question of fact, a matter which he ought himself to have decided as a question of law. But we do not think this objection is valid. He decided that the articles enumerated in the bill of exceptions were of such a character as to be exempt from attachment if they were necessary to the plaintiff's business as a milliner, and in actual use by her; and he left it to the jury to decide whether they were thus necessary and in use. The statute (Gen. Stats., c. 133, sec. 32, cl. 5) exempts the tools, implements, and fixtures necessary for carrying on the trade or business of the debtor, not exceeding one hundred dollars in value. The plaintiff's business of a milliner is within the statute, and the enumerated articles come within the description of "tools, implements, or fixtures": *Smith v. Gibbs*, 6

Gray, 298. Whether they were necessary for carrying on her business must depend upon the particular methods by which it was carried on; and this must necessarily be determined upon evidence to be addressed to the jury. The court cannot judicially determine that any one of the articles enumerated could be dispensed with by her: *Howard v. Williams*, 2 Pick. 83; *Davlin v. Stone*, 4 Cush. 359.

2. The defendant requested the court to rule that the plaintiff had waived her privilege of claiming the articles as exempt from attachment, by her neglect to claim any of the articles when attached by the officer, as being so exempt by statute. The court declined so to rule, and instructed the jury that it was not necessary for the plaintiff to prove any demand or pointing out of the tools and implements, in order to sustain the action. If they were necessary, as had been stated, and were actually in use as tools and implements in her trade, so as to be plainly distinguishable as such, he held that to be sufficient.

If these articles had been so intermingled with the plaintiff's other property that the officer could not distinguish them, a neglect to claim them when the officer was about to attach the whole might be a waiver: *Clapp v. Thomas*, 5 Allen, 158. This point was carefully noticed by the judge, and under his instructions the jury must have found that the articles were plainly distinguishable as tools and implements of the plaintiff's trade. He also ruled correctly that a demand was not necessary in such case. In attaching articles of this character, an officer is a trespasser: *Bean v. Hubbard*, 4 Cush. 85; *Davlin v. Stone*, 4 Id. 359.

3. The testimony of Mr. Bonney was properly rejected. He was unable to state the language of the deceased witness, or even the substance of it. The rule is settled that when proof is offered of what a deceased witness has testified at a former hearing, it must be not merely of a part of it, or the substance of it, but the whole of the testimony touching the matter in controversy: *Commonwealth v. Richards*, 18 Pick. 434 [29 Am. Dec. 608]; *Warren v. Nichols*, 6 Met. 261.

Exceptions overruled.

TOOLS AND IMPLEMENTS OF TRADE, WHAT ARE, WITHIN MEANING OF EXEMPTION LAWS: See *Patten v. Smith*, 10 Am. Dec. 166; *Danforth v. Woodward*, 20 Id. 531; *Kelburn v. Demming*, 21 Id. 543, and note considering the question; *Spooner v. Fletcher*, 21 Id. 579; *Knob v. Chadbourne*, 48 Id. 487; *Healy v. Bateman*, 60 Id. 94; *Whitcomb v. Reid*, 66 Id. 579; *Garrett v.*

Patchin, 70 Id. 414, *Goddard v. Chaffee*, 79 Id. 796; *Daniels v. Haywood*, 81 Id. 731; *Henry v. Sheldon*, 82 Id. 644.

"NECESSARY," MEANING OF, IN STATUTE EXEMPTING TOOLS AND IMPLEMENTS OF TRADE: See *Healy v. Bateman*, 60 Am. Dec. 94; *Garrett v. Patchin*, 70 Id. 414.

WAIVER OF PRIVILEGE OF CLAIMING ARTICLES AS EXEMPT, BY FAILURE TO CLAIM THEM WHEN LEVIED UPON: See *Lynd v. Picket*, 82 Am. Dec. 79. The principal case is referred to in *Copp v. Williams*, 135 Mass. 405, on the point that if goods, which are exempt from attachment, are so intermingled with other similar goods, which are not exempt, that the officer cannot distinguish them, it is the duty of the owner to give the officer notice of his intention to rely upon the exemption; but see the decision in this case; and see the principal case distinguished in *Dow v. Cheney*, 103 Id. 184, in holding that the owner of property exempt from attachment had waived his privilege of exemption.

OFFICER'S LIABILITY FOR LEVYING UPON ARTICLES EXEMPT: See *Von Dresser v. King*, 75 Am. Dec. 643, and note; *Lynd v. Picket*, 82 Id. 79. The principal case is cited in *Dow v. Cheney*, 103 Mass. 183, to the point that the attachment of exempt property by an officer, and the control and dominion which he exercised over it to the exclusion of the debtor, are acts sufficient to constitute a conversion, without a demand or refusal.

TESTIMONY OF DECEASED WITNESS AT FORMER TRIAL, HOW MUCH OF, TO BE PROVED: See *Wagers v. Dickey*, 49 Am. Dec. 467; *Emery v. Fowler*, 63 Id. 627; *Jones v. Ward*, 64 Id. 590, and the notes thereto. The principal case is approved in *Costigan v. Lunt*, 127 Mass. 356, on the point that a witness who gives the testimony of a deceased witness at a former trial is required to furnish the same testimony.

THE PRINCIPAL CASE WAS CITED, among others, in *Wallace v. Bartlett*, 108 Mass. 54, to the point that the well-settled construction of clause 5, section 32, chapter 133, of the General Statutes of Massachusetts, exempting the tools, implements, and fixtures necessary for carrying on the trade or business of a debtor, is that it is intended for the protection of mechanics, artisans, handicraftsmen, and others whose manual labor and skill afford means of earning their livelihood, and it has accordingly been applied to tailors, shoemakers, milliners, fiddlers, and carriage-makers.

McDONALD v. SNELLING.

[14 ALLEN, 290.]

ONE IS LIABLE FOR NATURAL AND PROBABLE CONSEQUENCES OF HIS NEGLIGENCE.

ONE WHOSE SERVANT NEGLIGENCELY DRIVES IN PUBLIC STREET AGAINST SLEIGH OF ANOTHER, thereby causing the horse drawing the same to become frightened and run away, is responsible for injuries caused to a third person by such runaway horse.

TORT. The declaration alleged that the defendant's servant carelessly and negligently drove his sled or sleigh in the city of Boston against the sleigh of one Baker, with such force and

violence as to break it to pieces, throwing Baker out, frightening his horse, and causing the animal to escape from the control of its driver, and to run violently along Tremont Street, around a corner near by, into Eliot Street, where it ran over the plaintiff, his sleigh and horse, breaking the sleigh to pieces, injuring the plaintiff's horse, and throwing the plaintiff to the ground, breaking his collar-bone and otherwise causing him much injury. The defendant demurred to the declaration because it did not appear that the defendant's alleged negligence was the proximate cause of the plaintiff's injury sufficient to render the defendant liable. The demurrer was overruled, and judgment ordered for the plaintiff. The defendant appealed.

J. Nickerson, for the plaintiff.

J. L. Stackpole, for the defendant.

By Court, FOSTER, J. The question raised by this demurrer is, whether the injury received by the plaintiff was so remote from the negligent act of the defendant that the action cannot be sustained, although the plaintiff was injured without his own fault, and would not have been injured but for the fault of the defendant. How far at common law is one guilty of negligence responsible in damages for the consequences resulting from his neglect?

If the present action had been brought against a town, under circumstances similar to those disclosed in this declaration, *Marble v. Worcester*, 4 Gray, 395, would be a decisive authority in favor of the defendant. The liability for damages caused by defects in highways is limited to cases where the defect is the direct and immediate cause of the injury: *Jenks v. Wilbraham*, 11 Id. 142. But this statute liability is more narrowly restricted than the rule in actions at common law for damages caused by negligence, in which it is perfectly well settled that the contributory negligence of a third party is no defense, where the defendant has also been guilty of negligence without which the damage would not have been sustained: *Eaton v. Boston and Lowell R. R.*, 11 Allen, 500. The extent of the defendant's responsibility cannot therefore be conclusively determined by the rule of *Marble v. Worcester*, *supra*, because the limits of liability under the statute as to defects in public ways and at common law for negligence are not identical. These cases against towns can be reconciled with general principles of the law only by the consideration

that they depend exclusively on a statute provision, within the terms of which they are strictly confined.

Opinions upon questions of marine insurance are frequently quoted to illustrate the meaning of the maxim, *Causa proxima non remota spectatur*. The exigencies of the present decision do not require an elaborate examination of the doctrine in its application to the law of insurance; but a few observations may be useful. Where the immediate cause of loss is a peril insured against, the underwriters are not exonerated by the fact that its original cause was something not covered by the policy. They are liable if the loss ends in a peril insured against, although it began in some other cause. Thus a loss arising immediately from a peril of the sea, but remotely from the negligence of the master, is protected by the policy; but it by no means follows that, in an action brought against the owner or master for such negligence, the consequent loss of the cargo could not be included in the measure of damages: *Redman v. Wilson*, 14 Mees. & W. 476. On the contrary, where a master unnecessarily deviated from his voyage, and during the deviation a cargo of lime was wet by a tempest, and the bark was thereby set on fire and consumed, the owner was held liable for the fault of his agent, the master, and the deviation was deemed to be sufficiently the proximate cause of the loss of the cargo: *Davis v. Garrett*, 6 Bing. 716. In a recent insurance cause, one learned judge, Willes, J., said: "The ordinary rule of assurance law is, that you are to look to the proximate and immediately operating cause, and to that only"; and another, Erle, C. J., said: "The words are to be construed with reference to the known principle pervading insurance law, *Causa proxima non remota spectatur*; the loss must be connected with the supposed cause of it, and in the relation of cause and effect, speaking according to common parlance": *Ionides v. Universal Ins. Co.*, 8 L. T., N. S., 705; *Marsden v. City and County Ass. Co.*, L. R. 1 Com. P. 232. But in an action for damages for refusing to receive a ship into a dock, the rule was said to be "that the damage must be proximate (not immediate), and fairly and reasonably connected with the breach of contract or wrong. As to what is so, different minds will differ": *Wilson v. Newport Dock Co.*, L. R. 1 Ex. 186.

Perhaps the truth may be that a maxim couched in terms so general as to be necessarily somewhat indefinite has been indiscriminately applied to different classes of cases in differ-

ent senses, or at least without exactness and precision; and that this is the real explanation of the circumstance that *causa proxima*, in suits for damages at common law, extends to the natural and probable consequences of a breach of contract or tort; while in insurance cases and actions on our highway statute it is limited to the immediately operating cause of the loss or damage. If this be so, the frequent reference to the maxim in cases like the present is not particularly useful, and certainly not conducive either to an accurate statement of principles or to uniform and intelligible results. In insurance causes, the maxim is resorted to as furnishing a rule by which to determine whether a loss is attributable to a peril against which the contract has promised indemnity; and its application charges as frequently as it exonerates the underwriter: *Peters v. Warren Insurance Co.*, 3 Sum. 389; S. C., 14 Pet. 99; *Hillier v. Allegheny County Mut. Ins. Co.*, 3 Pa. St. 470 [45 Am. Dec. 656]. The limits of liability and the definition of proximate cause in the law of insurance are too narrow and restricted to be applied to the present case.

Definitions and illustrations drawn from other branches of the law may afford instructive analogies, but for controlling authorities we are to look to adjudications in actions of a similar nature to the present, and arising upon a state of facts more closely resembling those now under consideration. Here the defendant is alleged to have been guilty of culpable negligence. And his liability depends, not upon any contract or statute obligation, but upon the duty of due care which every man owes to the community, expressed by the maxim, *Sic utere tuo ut alienum non lædas*.

Where a right or duty is created wholly by contract, it can only be enforced between the contracting parties. But where the defendant has violated a duty imposed upon him by the common law, it seems just and reasonable that he should be held liable to every person injured whose injury is the natural and probable consequence of the misconduct. In our opinion, this is the well-established and ancient doctrine of the common law, and such a liability extends to consequential injuries by whomsoever sustained, so long as they are of a character likely to follow, and which might reasonably have been anticipated as the natural and probable result under ordinary circumstances of the wrongful act. The damage is not too remote if, according to the usual experience of mankind, the result was to be expected. This is not an impracticable or

unlimited sphere of accountability extending indefinitely to all possible contingent consequences. An action can be maintained only where there is shown to be, first, a misfeasance or negligence in some particular as to which there was a duty towards the party injured or the community generally; and secondly, where it is apparent that the harm to the person or property of another which has actually ensued was reasonably likely to ensue from the act or omission complained of.

Two recent cases, both much considered, sound and consistent with each other, well illustrate the true rule of law. A druggist who carelessly labeled belladonna, a deadly poison, as extract of dandelion, a harmless medicine, and sent it so labeled into the market, was held, by the court of appeals in New York, liable in damages, after it had passed through several intervening hands, had been purchased of an apothecary, and administered by the plaintiff to his wife, who was injured by using it as a medicine in consequence of the false label: *Thomas v. Winchester*, 6 N. Y. 397 [57 Am. Dec. 455]. Here the dealer owed to the public a duty not to expose human life to danger by falsely labeling a noxious drug and selling it in the market as a harmless article. To do so was culpable and actionable negligence towards all likely to be, and who in fact were, injured by the mistake. And the injury that did follow was the natural and easily foreseen result of the carelessness.

On the other hand, where one article, black oxide of manganese, in itself harmless, which became dangerous only by being combined with another, was sold by mistake, the plaintiff, who purchased it of a third party and mixed it with another substance, the combination with which caused a dangerous explosion, was held by this court to have no right of action against the original vendor who made the mistake, for the damages caused by the explosion: *Davidson v. Nichols*, 11 Allen, 514. The mistake in regard to an article in its own nature ordinarily harmless, in the absence of contract or false representation, was not a violation of any public duty, or negligence of such a wrongful and illegal character as to render the party who made it liable for its consequences to third persons. Nor was it a natural and probable consequence of such a mistake that this ordinarily innocuous substance would be mixed with another chemical agent, become explosive by the combination, and a third party be thereby injured.

It is clear from numerous authorities that the mere circumstance that there have intervened, between the wrongful cause

and the injurious consequence, acts produced by the volition of animals or of human beings, does not necessarily make the result so remote that no action can be maintained. The test is to be found, not in the number of intervening events or agents, but in their character, and in the natural and probable connection between the wrong done and the injurious consequence. So long as it affirmatively appears that the mischief is attributable to the negligence as a result which might reasonably have been foreseen as probable, the legal liability continues.

There can be no doubt that the negligent management of horses in the public street of a city is so far a culpable act that any party injured thereby is entitled to redress. Whoever drives a horse in a thoroughfare owes the duty of due care to the community, or to all persons whom his negligence may expose to injury. Nor is it open to question that the master in such a case is responsible for the misconduct of his servant.

Applying these principles more closely to the facts set forth in this declaration and admitted by the demurrer, we find that by careless driving the defendant's sled was caused to strike against the sleigh of one Baker with such violence as to break it in pieces, throwing Baker out, frightening his horse, and causing the animal to escape from the control of its driver and to run violently along Tremont Street, round a corner near by, into Eliot Street, where he ran over the plaintiff and his sleigh, breaking that in pieces and dashing him on the ground. Upon this statement, indisputably the defendant would be liable for the injuries received by Baker and his horse and sleigh. Why is he not also responsible for the mischief done by Baker's horse in its flight? If he had struck that animal with a whip and so made it run away, would he not be liable for an injury like the present? By the fault and direct agency of his servant the defendant started the horse in uncontrollable flight through the streets. As a natural consequence, it was obviously probable that the animal might run over and injure persons traveling in the vicinity. Every one can plainly see that the accident to the plaintiff was one very likely to ensue from the careless act. We are not therefore dealing with remote or unexpected consequences, not easily foreseen nor ordinarily likely to occur, and the plaintiff's case falls clearly within the rule already stated as to the liability

of one guilty of negligence for the consequential damages resulting therefrom.

These views are fortified by numerous decisions, to a few of which it may be expedient to refer. It was recently held by this court that when a horse was turned loose on the highway, and there kicked a colt running by the side of its dam, the owner of the horse is liable for that damage: *Barnes v. Chapin*, 4 Allen, 444. We cannot distinguish between the different ways of letting a horse loose upon the street; whether by leaving him there untied, or leaving a gate open, or, as in the present case, by driving against him, and thus causing him to run away. In *Powell v. Deveney*, 3 Cush. 300 [50 Am. Dec. 738], the defendant's servant left a truck standing beside a sidewalk in a public street, with the shafts shored up by a plank in the usual way. Another truckman temporarily left his loaded truck directly opposite on the other side of the same street, after which a third truckman tried to drive his truck between the two others. In attempting to do so with due care, he hit the defendant's truck in such a manner as to whirl its shafts round on the sidewalk so that they struck the plaintiff who was walking by, and broke her leg. For this injury she was allowed to maintain her action, the only fault imputable to the defendant being the careless position in which the truck was left by his servant on the street, which was treated as the sole cause of the breaking of the plaintiff's leg, and in legal contemplation sufficiently proximate to render the defendant responsible. See also *Powell v. Salisbury*, 2 Younge & J. 391; *Vandenburgh v. Truax*, 4 Denio, 464 [47 Am. Dec. 268]; *Rigby v. Hewitt*, 5 Ex. 240; *Greenland v. Chaplin*, 5 Id. 245; *Morrison v. Davis*, 20 Pa. St. 175 [57 Am. Dec. 695]; *Lynch v. Nurdin*, 1 Q. B. 29; *Thomas v. Winchester*, *supra*, and cases there cited. When a horse strayed on the highway and there viciously and violently kicked a child, the owner was held not liable in the absence of evidence that he knew the animal was in the habit of kicking; because the act was not one which it was in the ordinary course of nature for a horse of common temper and disposition to do: *Cox v. Burbidge*, 32 L. J., N. S., C. P. 89. See also *Cooke v. Waring*, 32 Id. Ex. 262. But two years later the same court held a defendant liable who had negligently left insecure a gate which he was bound to repair, in consequence of which his horse strayed into the field of an adjoining proprietor and there kicked another horse; because this was the natural consequence of two horses meet-

ing under such circumstances, and such an injury produced by such an animal was deemed to be the proximate consequence of the defendant's negligence: *Lee v. Riley*, 34 L. J., N. S., C. P. 212. See also *Reed v. Edwards*, 34 Id. C. P. 31. In a case where the defendant left on the street exposed for sale a machine for crushing oil cake between rollers, into the cogs of which a little child put his fingers while another boy turned the handle, and the fingers were crushed, the court held that the act was too remote; and Bramwell, B., said: "The defendant was no more liable than if he had exposed goods colored with a poisonous paint, and the child had sucked them"; but the same baron added: "Further, I can see no evidence of negligence in him. If his act in exposing this machine was negligence, will his act in exposing it again be called willfully mischievous? If that could not be said, then it is not negligence, for between negligence and willful mischief there is no difference but of degree": *Mangan v. Atherton*, L. R. 1 Ex. 239. This case has no tendency and indicates no intention to overrule *Dixon v. Bell*, 5 Maule & S. 198, in which, an injury having been received from a loaded gun, Lord Ellenborough held the owner liable for leaving a dangerous instrument in a state capable of doing mischief, although the mischief was caused by a girl taking it up, pointing it at a child, and snapping the trigger after the priming had been withdrawn.

It may not always be easy to determine whether any particular act of negligence is of such a character as to render the party guilty of it liable to third persons; or whether the ensuing consequences are so far natural and probable as to impose a liability for them in damages. Cases may be put, falling very near the dividing line, and no rule can be laid down in advance which will determine all with precision. But the difficulty of applying a principle is a poor argument against its validity, unless one more satisfactory can be proposed in its stead. There may be discrepancies and want of uniformity in the application of the principle to the facts of particular cases, but all the authorities cited concur in the support of the doctrine we have stated, and agree as to the rule by which the extent of liability for consequential damages resulting from negligence ought to be determined.

In the opinion of a majority of the court, the demurrer in the present case must be overruled, because on the statements of the declaration the plaintiff's injury does not appear to be

so remote from the negligence of the defendant as to exonerate the latter from liability. When such a question is raised by the pleadings or arises upon agreed or undisputed facts, it is matter of law; but where the evidence is contradictory, or the inferences to be drawn from it are uncertain, the jury must determine by a verdict whether the facts fall within the rule of law to be laid down on the subject: *Wilson v. Newport Dock Co.*, L. R. 1 Ex. 186.

Demurrer overruled.

ONE IS LIABLE FOR NATURAL AND PROBABLE CONSEQUENCES OF HIS TORTIOUS ACTS: *Thomas v. Winchester*, 57 Am. Dec. 455, and note; *Morrison v. Davis*, 57 Id. 695; *Scott v. Hunter*, 84 Id. 542; compare *Ryan v. New York Central R. R.*, 91 Id. 49, and note; *Lackawanna etc. R. R. v. Chenevix*, 91 Id. 168; although intervening events or agencies contributed to the injury: *Derry v. Flitner*, 118 Mass. 134; *Norton v. Eastern R. R.*, 113 Id. 370. So one who negligently uses a dangerous instrument or article, or causes or authorizes its use by another in such a manner or under such circumstances that he has reason to know that it is likely to produce injury, is responsible for the natural and probable consequences of his act to any person injured who is not himself in fault: *Carter v. Towne*, 98 Id. 568; *Wellington v. Downer Kerosene Oil Company*, 104 Id. 68. If, therefore, an apothecary negligently sells a poison as and for a harmless medicine to A, who procures it for the purpose of administering it to B, and gives B a dose of it, from the effects of which B dies, the apothecary is responsible therefor: *Norton v. Sewall*, 106 Id. 144. But a common carrier who negligently delays to send forward goods delivered to him for transportation is not liable for an injury to the goods by a peril excepted in the contract of carriage, happening without his fault: *Hoadley v. Northern Transportation Co.*, 115 Id. 308; compare *Michaels v. New York Central R. R.*, 84 Am. Dec. 415, and cases in note; *Read v. Spaulding*, 84 Id. 426. If a horse escapes from the control of the owner's agent, through his negligence, and after running some distance enters upon a railroad track at a point where there are no barriers, on which it is injured at some distance farther, if the jury find that the injury was likely to happen as a natural and probable consequence of such negligence, so that the negligence might in their judgment be considered to be a contributory cause of the injury, the owner of the horse is not entitled to recover: *Amstein v. Gardner*, 134 Mass. 11; and in an action to recover for injuries caused by the defendant's negligence, to which the fault of another contributed, the defendant's liability is not affected by the fact that the fault of such person was not negligence, but voluntary intermeddling, if it was conduct which the defendant should have apprehended and provided against: *Lane v. Atlantic Works*, 111 Id. 141. In an action against a railroad company for the negligent loss by fire of grain stored in an elevator, where it appeared that the elevator was on a wharf several hundred feet from the track near which the fire occurred, and the intervening space was mostly covered with water, the possibility of its destruction by fire, communicated from such a distance, is too remote to justify a finding solely upon the evidence afforded by the loss of the elevator, that in reference to the grain contained in it, the company did not use due care: *Barron v. Eldridge*, 100 Id. 461. The principal case is cited to the foregoing propo-

sitions. It is also cited in *Billman v. Indianapolis etc. R. R.*, 76 Ind. 171, as discussing and explaining the true force and meaning of the maxim, *Causa proxima non remota spectatur*, and quoted in *Kellogg v. Chicago etc. R'y*, 26 Wis. 278, as laying down the law on this point with great accuracy and precision; it is referred to in *Dietrich v. Inhabitants of Northampton*, 138 Mass. 17, on the question of remoteness between the wrongful act and the injury, and cited in *Boston etc. R. R. v. Shanly*, 107 Id. 578, to the point that the case of *Marble v. Worcester*, 4 Gray, 395, is to be limited in its application to actions against towns.

THE PRINCIPAL CASE IS ALSO CITED in *French v. Vining*, 102 Mass. 136, to the point that if a vendor of hay knew that it had a defect about it, or had met with an accident that rendered it not only unsuitable for the use designed, but dangerous or poisonous, it would plainly be a violation of good faith, and an illegal act to sell it without disclosing its condition; in *Lyons v. Merrick*, 105 Id. 77, to the point that in actions of tort the plaintiff is not obliged to prove allegations not essentially descriptive or so connected with material averments that they cannot be separated; and it is referred to in *Tuttle v. Travelers' Ins. Co.*, 134 Id. 177, on the point that under a policy of insurance against accident, providing that no claim shall be made under it "when the death or injury may have happened in consequence of exposure to any obvious or unnecessary danger," no recovery could be had for the death of the assured caused by his being struck by a railroad train while running along the track in front of it in the night-time, for the purpose of getting on a train approaching in an opposite direction on a parallel track.

CUSHING v. BREED.

[14 ALLEN, 376.]

PROPERTY IN GRAIN SOLD, CONSTITUTING PART OF MASS IN ELEVATOR, PASSES TO VENDEE WITHOUT SEPARATION, and the vendee becomes a tenant in common with the vendor, where the vendor gives an order on the proprietors of the elevator to deliver the grain sold to the vendee, and the elevator proprietors accept the order, and agree thenceforward to hold that quantity for the vendee.

CONTRACT to recover the price of five hundred bushels of oats. The answer admitted the sale and delivery of 105 bushels, and offered judgment for the price thereof, but denied the sale and delivery of the remainder. The plaintiffs, who were the owners of a cargo of oats, amounting to 6,695 bushels, in two bins in the Merchants' Grain Elevator in Boston, agreed to sell to the defendants five hundred bushels thereof at ninety-one cents per bushel, and gave an order upon the proprietors of the elevator to deliver that quantity to the defendants. This order was accepted by the elevator proprietors in the usual manner, by retaining and entering it in their books, and on the same day they delivered to the defendants 105 bushels. A fire afterwards occurred in the elevator, ren-

dering the oats remaining in it nearly worthless. The judge who tried the case, without a jury, ruled that, upon the facts, there was no such change of title to the grain, except as to the 105 bushels, as to make the defendants liable for the price; and held that the plaintiffs were only entitled to recover for the 105 bushels. The plaintiffs alleged exceptions.

W. Gaston and W. A. Field, for the plaintiffs.

C. B. Goodrich and I. J. Austin, for the defendants.

By Court, CHAPMAN, J. The use of elevators for the storage of grain has introduced some new methods of dealing, but the rights of parties who adopt these methods must be determined by the principles of the common law. The proprietors of the elevator are the agents of the various parties for whom they act. When several parties have stored various parcels of grain in the elevator, and it is put into one mass, according to a usage to which they must be deemed to have assented, they are tenants in common of the grain. Each is entitled to such a proportion as the quantity placed there by him bears to the whole mass. When one of them sells a certain number of bushels, it is a sale of property owned by him in common. It is not necessary to take it away in order to complete the purchase. If the vendor gives an order on the agents to deliver it to the vendee, and the agents accept the order, and agree with the vendee to store the property for him, and give him a receipt therefor, the delivery is thereby complete, and the property belongs to the vendee. The vendor has nothing more to do to complete the sale, nor has he any further dominion over the property. The agent holds it as the property of the vendee, owned by him in common with the other grain in the elevator. It is elementary law that a tenant in common of personal property in the hands of an agent may sell the whole or any part of his interest in the property, by the method above stated, or by any other method equivalent to it. Actual separation and taking away are not necessary to complete the sale. As to the property sold, the agent acts for a new principal, and holds his property for him. The law is the same whether the proprietors are numerous or the vendor and vendee are owners of the whole. If the vendee resells the whole or a part of what he has purchased, his vendee may, by the same course of dealing, become also a tenant in common as to the part which he has bought.

This is not like the class of sales where the vendor retains the possession, because there is something further for him to do, such as measuring or weighing or marking, as in *Scudder v. Worster*, 11 Cush. 573; nor like the case of *Weld v. Cutler*, 2 Gray, 195, where the whole of a pile of coal was delivered to the vendee in order that he might make the separation. But the property is in the hands of an agent; and the same person who was the agent of the vendor to keep, becomes the agent of the vendee to keep; and the possession of the agent becomes the possession of the principal: *Hatch v. Bayley*, 12 Cush. 27, and cases cited. The tenancy in common results from the method of storage which has been agreed upon, and supersedes the necessity of measuring, weighing, or separating the part sold.

No delivery is necessary to a tenant in common: *Beaumont v. Crane*, 14 Mass. 400.

Upon these principles, the plaintiffs are entitled to recover the amount due them for the property thus sold and delivered to the defendants. The damage occasioned to this property by the fire must be borne by the defendants as owners of the property.

Exceptions sustained.

PROPERTY, WHETHER PASSES IF SOME ACT IS NECESSARY TO IDENTIFY GOODS SOLD: See *Winslow v. Leonard*, 62 Am. Dec. 354, and note; *Sewell v. Eaton*, 70 Id. 471; *Nicholson v. Taylor*, 72 Id. 728. A sale of barrels of flour, part of a larger quantity on storage at a railroad depot, and a presentation to and acceptance of an order therefor on the railroad company, in accordance with the usage of the business, was held complete, and the subsequent loss of the flour while stored at the depot fell on the purchaser: *Newhall v. Langdon*, 39 Ohio St. 95; *Hall v. Boston etc. R. R.*, 14 Allen, 443; S. C., *post*, p. 783. So where grain, part of a larger quantity lying in bulk on storage in a warehouse, is sold, the delivery of an order therefor upon the warehouseman authorizes him to make the separation or appropriation necessary to complete the sale, and if that is accomplished, either by actual separation or by appropriation to the use or credit of the purchaser, in the usual mode of transacting the business of the warehouse, he acquires the title, right of possession, and constructive possession: *Keeler v. Goodwin*, 111 Mass. 491. The principal case is cited to the foregoing propositions.

OWNERS BECOME TENANTS IN COMMON OF GRAIN MIXED WITH THEIR CONSENT BY WAREHOUSEMEN IN COMMON MASS: *Dole v. Olmstead*, 85 Am. Dec. 397; S. C., 89 Id. 386; and see *Chase v. Washburn*, 59 Id. 623, and note. The principal case is cited to this point in *Sexton v. Graham*, 53 Iowa, 187, 199; *Nelson v. Brown*, 53 Id. 556.

THE PRINCIPAL CASE IS ALSO CITED in *Shattuck v. Green*, 104 Mass. 45, to the point that the possession of an agent or of a tenant in common, holding the goods for the vendor, and as his property, and not adversely, is the construc-

tive possession of the vendor; and if he sells the goods thus held as his, a warranty of title is implied; and in *Townsend v. Hargraves*, 118 Id. 332, to the point that where a warehouseman is notified of a sale of the goods stored, and undertakes to deal with and hold them for the purchaser, the warehouseman becomes the agent of the purchaser, and holds possession for his principal.

SEARS v. EASTERN RAILROAD COMPANY.

[14 ALLEN, 422.]

RAILROAD COMPANY, BY ADVERTISING TIMES WHEN ITS TRAINS RUN, AGREES WITH HOLDERS OF TICKETS that its trains will run at the times advertised, but with an implied reservation of a power to change the times upon giving reasonable notice.

REASONABLE NOTICE OF CHANGE OF TIME, AS ADVERTISED IN NEWSPAPERS, WHEN RAILROAD TRAIN WILL RUN, IS NOT GIVEN to one who previously purchased tickets in accordance with the advertisement, by posting up handbills in the cars and stations, without his knowledge, announcing the change.

EXPRESS CONTRACT CANNOT BE CONTROLLED OR VARIED BY USAGE; and therefore, where a railroad company advertises the times when its trains will run, and sells tickets accordingly, evidence of a usage of the company to change the times of running trains, without giving reasonable notice thereof, is inadmissible.

ACTION containing one count in contract and one in tort. The defendants, common carriers of passengers, published daily advertisements of their regular trains in the Boston Daily Advertiser, Post, and Courier, announcing that a train would leave Boston for Lynn at 9:30, p. m., except on Wednesdays and Saturdays. The plaintiff, who had consulted the advertisement, purchased a package of five tickets between Boston and Lynn. The tickets did not specify any particular train, but each purported to be good for one passage during the year between the places. One Friday the plaintiff came to Boston on a forenoon train; and in the evening, shortly after 9 o'clock, went to the defendants' station at Boston, for the purpose of taking the 9:30 train to Lynn. He was informed that the train had been postponed until 11:15, on account of an exhibition in Boston, and he thereupon hired a buggy and drove to Lynn. Printed handbills announcing that the train would be postponed were posted in the cars and stations on that day, but the plaintiff did not see them. The defendants had been accustomed to frequently postpone this train, and to give notice thereof in this manner, and offered to prove a usage to that effect, if competent. It was agreed that if, upon the foregoing

facts, the plaintiff was entitled to recover, judgment should be entered in his favor for ten dollars, without costs. Judgment was given for the defendants, and the plaintiff appeals.

J. L. Stackpole, for the plaintiff.

C. P. Judd, for the defendants.

By Court, CHAPMAN, J. If this action can be maintained, it must be for the breach of the contract which the defendants made with the plaintiff. He had purchased a package of tickets entitling him to a passage in their cars for each ticket from Boston to Lynn. This constituted a contract between the parties: *Cheney v. Boston and Fall River R. R.*, 11 Met. 121 [45 Am. Dec. 190]; *Boston and Lowell R. R. v. Proctor*, 1 Allen, 267 [79 Am. Dec. 729]; *Najac v. Boston and Lowell R. R.*, 7 Id. 329. The principal question in this case is, What are the terms of the contract? The ticket does not express all of them. A public advertisement of the times when their trains run enters into the contract, and forms a part of it: *Denton v. Great Northern R'y*, 5 El. & B. 860. It is an offer which, when once publicly made, becomes binding if accepted before it is retracted: *Boston and Maine R. R. v. Bartlett*, 3 Cush. 227. Advertisements offering rewards are illustrations of this method of making contracts. But it would be unreasonable to hold that advertisements as to the time of running trains, when once made, are irrevocable. Railroad corporations find it necessary to vary the time of running their trains, and they have a right, under reasonable limitations, to make this variation, even as against those who have purchased tickets. This reserved right enters into the contract, and forms a part of it. The defendants had such a right in this case.

But if the time is varied, and the train fails to go at the appointed time, for the mere convenience of the company or a portion of their expected passengers, a person who presents himself at the advertised hour and demands a passage is not bound by the change unless he has had reasonable notice of it. The defendants acted upon this view of their duty, and gave certain notices. Their trains had been advertised to go from Boston to Lynn at 9:30, P. M., and the plaintiff presented himself, with his ticket, at the station to take the train; but was there informed that it was postponed to 11:15. The postponement had been made for the accommodation of passengers who desired to remain in Boston to attend places of amusement.

Certain notices of the change had been given; but none of them had reached the plaintiff. They were printed handbills posted up in the cars and stations on the day of the change, and also a day or two before. Though he rode in one of the morning cars from Lynn to Boston, he did not see the notice, and no legal presumption of notice to him arises from the fact of its being posted up: *Brown v. Eastern R. R.*, 11 Cush. 101; *Malone v. Boston and Worcester R. R.*, 12 Gray, 388 [74 Am. Dec. 598]. The defendants published daily advertisements of their regular trains in the Boston Daily Advertiser, Post, and Courier, and the plaintiff had obtained his information as to the time of running from one of these papers. If they had published a notice of the change in these papers, we think he would have been bound by it. For as they had a right to make changes, he would be bound to take reasonable pains to inform himself whether or not a change was made. So if in their advertisement they had reserved the right to make occasional changes in the time of running a particular train, he would have been bound by the reservation. It would have bound all passengers who obtained their knowledge of the time-tables from either of these sources. But it would be contrary to the elementary law of contracts to hold that persons who relied upon the advertisements in either of those papers should be bound by a reservation of the offer, which was, without their knowledge, posted up in the cars and stations. If the defendants wished to free themselves from their obligations to the whole public to run a train as advertised, they should publish notice of the change as extensively as they published notice of the regular trains. And as to the plaintiff, he was not bound by a notice published in the cars and stations which he did not see. If it had been published in the newspapers above mentioned, where his information had in fact been obtained, and he had neglected to look for it, the fault would have been his own.

The evidence as to the former usage of the defendants to make occasional changes was immaterial, because the advertisement was an express stipulation which superseded all customs that were inconsistent with it. An express contract cannot be controlled or varied by usage: *Ware v. Hayward Rubber Co.*, 3 Allen, 84.

The court are of opinion that the defendants, by failing to give such notice of the change made by them in the time of running their train on the evening referred to as the plaintiff

was entitled to receive, violated their contract with him, and are liable in this action.

Judgment for the plaintiff.

RAILROAD TICKETS AS CONTRACTS: See *Quimby v. Vanderbilt*, 72 Am. Dec. 469, and note; *Boston etc. R. R. v. Proctor*, 79 Id. 729; *Johnson v. Concord R. R.*, 88 Id. 199, 201.

EXPRESS CONTRACT CANNOT BE CONTRADICTIONED OR VARIED BY USAGE: *Barlow v. Lambert*, 65 Am. Dec. 374, and note; *Cox v. Peterson*, 68 Id. 145; *Dickinson v. Gay*, 83 Id. 656; *Johnson v. Concord R. R.*, 88 Id. 199; *Boardman v. Spooner*, 90 Id. 196.

HALL v. BOSTON AND WORCESTER R. R. CORP.

[14 ALLEN, 489.]

PROPERTY IN TWENTY-EIGHT BARRELS OF FLOUR PASSES TO VENDEE AS BEING SUFFICIENTLY SELECTED AND SEPARATED, where the vendee purchased fifty barrels constituting part of a larger number at a railroad depot, received an order from the vendor upon the railroad company for a delivery thereof, and presented the same to the company, and obtained in return a "flour check," or order upon a clerk whose business it was to deliver such freight accordingly, under which twenty-two barrels were delivered to the vendee, but the remaining twenty-eight barrels were by mistake delivered to some unauthorized third person.

MISDELIVERY OF PROPERTY BY ANY BAILEE TO UNAUTHORIZED PERSON IS OF ITSELF CONVERSION, rendering the bailee liable in trover, without regard to the question of due care or degree of negligence.

TORT for the conversion of twenty-eight barrels of flour. The questions in the case, which arose upon instructions to the jury, sufficiently appear from the opinion.

C. S. Lincoln, for the plaintiffs.

G. S. Hale, for the defendants.

By Court, FOSTER, J. The plaintiffs purchased and paid for fifty barrels of flour, and received a bill of sale from Clap and Brother, together with an order by them upon the defendant corporation to deliver that number of barrels. The defendants had at that time in their freight-house a larger number belonging to Clap and Brother. The order was presented to the proper clerk of the railroad corporation by the teamster of the plaintiffs, who gave a receipt for fifty barrels, and received in return "a flour check," or order upon the clerk whose business it was to deliver such freight, for the same number in favor of the plaintiffs. The flour check or order was presented to the delivery clerk, and left in his possession.

Under it, he delivered to the plaintiffs twenty-two barrels of flour, and indorsed them on the check or order. All these proceedings were in conformity with the usual course of such business, as recognized and permitted by the officers of the railroad corporation. But the remaining twenty-eight barrels were never in fact received by the plaintiffs, but were by mistake delivered to some unauthorized stranger by the delivery clerk. The facts disclose a sufficient selection and separation of the twenty-eight barrels as the property of the plaintiffs. The vendors ordered their delivery; the corporation by its agents accepted the order, and agreed to deliver the flour. It was their duty to select the barrels to be delivered to the plaintiffs; and they necessarily made an actual selection and separation of twenty-eight barrels under the order before the misdelivery to the stranger, otherwise they could not have committed the mistake, and indorsed the amount wrongly delivered on the plaintiffs' check. These proceedings were quite sufficient to vest in the plaintiffs the title to the twenty-eight barrels now in controversy. Even without the misdelivery, the effect of the vendor's order, when accepted by the parties who had the custody of the whole property, and were to select out of the whole the portion to be delivered under the circumstances, and according to the usual course of business, would have transferred the property in twenty-eight barrels to the plaintiffs, as against the creditors of the vendor, and so as to subject the vendees to the loss in case of fire: *Cushing v. Breed*, 14 Allen, 376 [*ante*, p. 777].

The plaintiffs have therefore a property and right of possession sufficient to maintain the present action.

The remaining question is, Are the defendants liable for a conversion of the property? It is insisted on their behalf that this depends upon the amount of care they were bound to exercise, and the degree of negligence of which they were guilty. But this is an erroneous view of the law. A misdelivery of property by any bailee to a person unauthorized by the true owner is of itself a conversion, rendering the bailee liable in trover, without regard to the question of due care or degree of negligence. This is a well-established legal principle, applicable to every description of bailment. The action of trover is not maintained by proof of negligence, but only of misfeasance amounting to a conversion. And a delivery to an unauthorized person is as much a conversion as would be a sale of the property, or an appropriation of it to the bailee's own

use. In such cases, neither a sincere and apparently well-founded belief that the tortious act was right, nor the exercise of any degree of care, constitutes a defense even to a gratuitous bailee: *Lichtenhein v. Boston and Providence R. R.*, 11 Cush. 70; *Polley v. Lenox Iron Works*, 2 Allen, 182; *Lawrence v. Simons*, 4 Barb. 354; *Esmay v. Fanning*, 9 Id. 176. The question whether the defendants were warehousemen bound to exercise ordinary care, or gratuitous bailees liable only for gross negligence, is therefore wholly immaterial.

Furthermore, when the freight was received into the depot the railroad corporation became liable as warehousemen: *Norway Plains Co. v. Boston and Maine R. R.*, 1 Gray, 263 [61 Am. Dec. 423]. The point that the owners of the property failed to remove it within a reasonable time does not appear by the exceptions to have been raised at the trial. The mere fact of a sale by the original owners to the plaintiffs would not change the character of the bailment, and diminish the responsibility of the warehousemen. The effect of an unreasonable delay by the owner to remove the property upon the liability of a railroad which has freight on hand ready to be delivered might, under some circumstances, require consideration. But in the present case no such question arises.

Exceptions overruled.

PROPERTY, WHETHER PASSES, IF CHATTELS ARE NOT SELECTED AND SEPARATED: See *Cushing v. Breed*, ante, p. 777, and note.

MISDELIVERY OF PROPERTY BY BAILEE TO UNAUTHORIZED PERSON RENDERS BAILEE RESPONSIBLE FOR ITS VALUE, without regard to the question of due care or degree of negligence: *Cass v. Boston etc. R. R.*, 14 Allen, 453; *Jenkins v. Bacon*, 111 Mass. 376; *Forbes v. Boston etc. R. R.*, 133 Id. 156; but see *Jenkins v. Bacon*, 111 Id. 382, per Morton, J., dissenting, all citing the principal case; see also *Holbrook v. Wight*, 35 Am. Dec. 607.

VERMONT AND MASSACHUSETTS RAILROAD COMPANY v. FITCHBURG RAILROAD COMPANY.

[14 ALLEN, 462.]

RAILROAD COMPANY IS LIABLE TO CONNECTING RAILROAD COMPANY FOR INJURIES TO CARS OF LATTER arising from a defective condition of the road of the former, whether attributable to negligence or not, if the contract be construed to include cars, where the former company agreed to draw over its road the cars of the latter with their passengers and freight, and the latter agreed to save the former harmless from all claims and damages arising from any injury to passengers, or loss of or damage to baggage, goods, and freight, while in transit over the

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same, "unless such injury, loss, or damage shall be clearly shown to arise from or be occasioned by the negligence or default" of the transporting company, "or from some defect in the road."

RAILROAD COMPANY IS LIABLE AS COMMON CARRIER FOR INJURIES TO CARS OF CONNECTING COMPANY while they are in transit over its road, and which it receives with their passengers and freight into its exclusive custody and control.

CONTRACT by the Vermont and Massachusetts Railroad Company to recover damages for injuries to nine of its cars while being transported over the road of the Fitchburg Railroad Company. A contract had been entered into between the two railroad companies, whereby the Fitchburg Railroad Company agreed to draw over its road the cars of the connecting Vermont and Massachusetts Railroad Company, with their passengers and freight, for a certain compensation, and the Vermont and Massachusetts Railroad Company agreed "to indemnify and save harmless the Fitchburg Railroad Company of and from all claims, damages, costs, and expenses, of every nature and description, arising from or in any way growing out of or connected with any injury to any passenger or passengers, and any loss or damage to any baggage or property of any passenger or passengers, and any loss of or damage to any and all goods and freight of every description, going to or coming from the Vermont and Massachusetts Railroad, and the roads connected therewith, while in transit over the Fitchburg Railroad, or in its depots, or upon its premises, unless such injury, loss, or damage shall be clearly shown to arise from or be occasioned by the negligence or default of the Fitchburg Railroad Company, its servants or agents, or from some defect in the road, buildings, or machinery of the said Fitchburg Railroad Company, in which case any and all claims, damages, costs, and expenses arising from or resulting from such negligence, default, or defect shall be borne by the Fitchburg Railroad Company." Afterwards, while a train of the plaintiffs' freight-cars was in transit over the defendants' road, in the exclusive custody of the defendants' servants, a portion of the train was thrown from the track and the cars in question injured. The accident was caused by the breaking of the flume of a mill-pond, about a mile from the road, suddenly releasing the waters of the pond, which overflowed the road-bed and washed away the embankment from beneath the rails and sleepers. The freight train was suitably equipped and conducted, and the road at the place where the accident happened was properly constructed,

and in a safe condition, until washed away by the waters of the pond. The case was reserved for the determination of the full court; and if the court should be of the opinion that the plaintiffs were entitled to recover, the case was to be sent to an assessor to ascertain the damages.

D. S. Richardson, for the plaintiffs.

H. C. Hutchins, for the defendants.

By Court, BIGELOW, C. J. In the view which we take of this case, it is quite immaterial to its decision whether the defendants are held liable under their written contract with the plaintiffs, or by virtue of the legal responsibility assumed by them in undertaking to receive and transport over their road the cars of the plaintiffs. If, by the true construction of the contract, it is held that it was intended to include within its terms the cars in which goods and merchandise are transported, then, on the facts stated, we think it clear that the defendants are liable in this action. The stipulation is clear and explicit that the defendants shall bear all damages arising from the negligence of their servants or agents, or from any defect in the road. There can be no doubt that the proximate cause of the destruction of the cars belonging to the plaintiffs was a defect in the road. The bed or roadway on which the rails of the defendants' road were laid was washed away, leaving them without support, so that they were insufficient to bear the weight of the cars in their transit over them. Whatever may have been the origin or cause of this condition of the road, it is clear beyond controversy that it was in a defective and unsafe condition, and that this condition was the direct and immediate cause of the injury to and destruction of the plaintiffs' property. The agreement of the defendants is not that they will be responsible for defects in the road arising from their own negligence or the carelessness of their servants. If such had been the stipulation, the argument urged in behalf of the defendants would have had great force. But the agreement is, that they shall be liable for all damages caused by such negligence or carelessness, or from a defect in the road. The insertion of this last clause in the connection in which it stands, and in a disjunctive form, removes all ambiguity, and indicates a clear intention to assume a liability for all losses arising from a defective condition of the road, whether attributable to the negligence of the defendants or to some other independent cause. Looking, therefore, at the terms of the written contract

only, we are of opinion that the defendants would be liable in this action on the facts stated if it should be held that the parties intended to embrace within the stipulations the cars of the plaintiffs while passing over the road of the defendants.

But if, as we are inclined to think, the written agreement is confined to goods and merchandise only which may be transported over the defendants' road in the cars of the plaintiffs, and does not include the latter, we are of opinion, on full consideration, that the defendants are liable for the destruction of the cars of the plaintiffs, under the legal duty and responsibility which attached to them in consequence of their general undertaking to transport them over their road. We can see no sufficient reason for holding that in performing this service they are not to be regarded as common carriers, and chargeable for any loss not caused by the act of God or the public enemy. It is not denied that the ordinary business of the defendants is that of common carriers, and that where there is no express stipulation for a more restricted liability, or the nature of the service which they are called on to render is not such as to impose on them a different kind or degree of responsibility, they would be liable as insurers of property intrusted to them for transportation. But it is urged by the defendants that their relation towards the plaintiffs, as owners of a railroad connecting with their own, and the consequent duty which they are required to perform of drawing the cars of the plaintiffs over their road, are of a peculiar and exceptional nature, and that they ought not to be held to be carriers within the common-law rule in performing this service. It seems to us, however, that the reasons on which this rule is founded do apply with equal force to them when so employed as when engaged in the ordinary business which they undertake to carry on. They act in their capacity as public carriers, and receive the cars to transport them from place to place; they draw them by their own engines, the plaintiffs being restrained by law (Gen. Stats., c. 63, sec. 119) from using their own motive power for the purpose; they take the cars into their exclusive custody and control, the plaintiffs and their servants having no charge or care over them whatever; and they receive for the services rendered a reasonable compensation in proportion to the time, labor, and expense incurred and the risk which they run. It seems to us that all the elements which go to make up the legal characteristics of the business of a common carrier are included within this statement of the

kind of service which the defendants render in transporting the cars of the plaintiffs. It cannot be said that the obligation which the statute imposes on the defendants to draw the cars of the plaintiffs over their road (Gen. Stats., c. 63, sec. 117) affords any ground for limiting their liability for loss or injury to them while in their possession. A like duty is imposed by law on every common carrier. His employment is a public one, and he is bound to carry all articles offered to him, coming within the scope of his ordinary employment, for a reasonable compensation.

We are unable to see any valid ground for a distinction between the case at bar and the familiar one of a common carrier undertaking to transport the property of another carrier over the route upon which the former usually transacts his business. A ferry-man undertaking to carry a wagon or a coach used in transporting merchandise or passengers would be liable as a common carrier for the articles while in his care and custody in crossing the ferry. A carrier who receives a box belonging to another carrier, in which merchandise is inclosed, for the purpose of transportation, would be liable for the loss of the box to the carrier who owned it as well as for the merchandise contained in it. The true ground on which the liability in all these cases rests is, that the owner of the property carried surrenders all control and custody over it, and commits it to the exclusive charge of the person who undertakes to carry it. In the cases where the owners of tow-boats have been held not to be liable for injuries to or the loss of boats which they were engaged in towing from place to place, the ground of the decisions is, that they do not, in performing the services, take exclusive possession and control of the boats attached to them, but that the officers and men belonging to the latter remain on board and exercise a partial direction over their movements. No such ground of distinction exists in the case at bar.

For these reasons, we are of opinion that the defendants are liable as common carriers for the destruction of the plaintiffs' cars while they were in transit over the road of the defendants: See *New Jersey Railroad etc. v. Pennsylvania Railroad*, 27 N. J. L. 100; *Smith v. Pierce*, 1 La. 349; *Alexander v. Greens*, 3 Hill, 9; S. C., 7 Id. 533; *Sproul v. Hemmingway*, 14 Pick. 1 [25 Am. Dec. 350].

Judgment for the plaintiffs.

THE PRINCIPAL CASE IS CITED IN *Commonwealth v. Hide and Leather Ins. Co.*, 112 Mass. 141, to the point that a railroad company has an insurable interest in cars of another company in its possession and use as common carriers; and in *Mackin v. Boston etc. R. R.*, 135 Id. 206, to the point that even in the absence of any statute or special contract regulating the terms of receiving and drawing the cars of one railroad company by another, it is bound as a common carrier to receive and draw them.

HAZARD v. DAY.

[14 ALLEN, 487.]

TELEGRAMS SIGNED BY VENDEE OF REAL ESTATE ARE INSUFFICIENT TO CONSTITUTE MEMORANDUM UNDER STATUTE OF FRAUDS, where they do not describe, mention, or refer to the subject-matter of the contract otherwise than by showing the terms of part payment, and directing the agents of the vendor to draw up a contract accordingly.

WRITING HAS NO EFFECT AS CONTRACT OR MEMORANDUM UNDER STATUTE OF FRAUDS until it is signed by the party to be charged.

CONTRACTS MADE ON SUNDAY ARE NOT UNLAWFUL IN RHODE ISLAND, unless they are within one's "ordinary calling."

IT IS NOT WITHIN ONE'S "ORDINARY CALLING," WITHIN MEANING OF RHODE ISLAND STATUTE prohibiting every one from doing "any labor or business or work of his ordinary calling" on Sunday, to purchase a dwelling-house for the personal occupation of himself and family, signing a contract therefor, and making and delivering a check in part payment.

IT IS WITHIN REAL ESTATE BROKER'S "ORDINARY CALLING," WITHIN MEANING OF RHODE ISLAND STATUTE, prohibiting every one from doing "any labor or business or work of his ordinary calling" on Sunday, to carry out the special instructions of his principal in relation to the property which he is employed to sell, as it is to do whatever is embraced in the general authority arising out of his employment as a broker.

SUPREME COURT OF MASSACHUSETTS HAS NO MORE POWER ON BILL OF EXCEPTIONS TO REVISE IN MATTER OF FACT the finding of the judge to whom by the waiver of a trial by jury the case has been submitted in the court below than the verdict of a jury.

CONTRACT on a check made the defendant, Horace H. Day, to the plaintiffs, Hazard and Apthorp, payment of which had been refused by the bank. The defendant, in 1865, had some conversation at Newport, Rhode Island, with Hazard, one of the plaintiffs, about certain real estate in Newport, which the plaintiffs as real estate brokers had for sale. The defendant soon afterwards went to New York, and on the 27th and 28th of June, 1865, a correspondence by telegraph took place between the parties concerning the property; but the telegrams only related to the payment of part of the purchase price,

and one of them contained a direction from the defendant to the plaintiffs to draw up a contract accordingly, but without otherwise in any way describing, naming, or referring to the property. A written form of contract to be signed by the defendant was also drawn up by the plaintiffs, and sent by them to the defendant on June 28th. On Sunday, July 2d, the parties met by the request of the defendant at Newport, and the defendant signed and delivered one part of the contract with the check in suit, and the plaintiffs delivered to the defendant the other part of the contract, which had been signed by their principal some days before. Early on Monday morning the defendant notified the plaintiffs that, as he had ascertained that he had been deceived by the plaintiffs' representations, he would not complete the contract, and should stop payment of the check, which he did. The judge who tried the case without a jury found that the alleged fraudulent representations on the part of the plaintiffs were not satisfactorily proved; that the purchase of a dwelling-house for the personal occupation of the defendant and his family, the signing of a contract therefor, and the making and delivery of a check in part payment, were not within the "ordinary calling" of the defendant, within the meaning of section 16, chapter 216, of the Revised Statutes of Rhode Island, prohibiting any one from doing on the Lord's day "any labor or business or work of his ordinary calling"; that the acts of the plaintiffs in delivering the contract signed by their principal, and in receiving from the defendant the duplicate of the contract and the check signed by him, were acts within their "ordinary calling"; and that the various telegrams and writings previous to the Sunday in question were not sufficient in law to amount to or prove a contract. The judge thereupon found for the defendant. The plaintiffs alleged exceptions.

S. Bartlett and F. A. Brooks, for the plaintiffs.

W. P. Sheffield and J. S. Holmes, for the defendant.

By Court, GRAY, J. It is clear that no contract or memorandum in writing, sufficient to satisfy the statute of frauds, was made before Sunday, the 2d of July. The dispatches which passed by telegraph between the parties on the 27th and 28th of June were insufficient to constitute such a memorandum, because they showed at most the terms of payment in part, and a direction from the defendant to the plaintiffs to

draw up a contract accordingly, but did not otherwise describe, mention, or refer to the subject of the contract: *Farwell v. Mather*, 10 Allen, 322 [87 Am. Dec. 641]; *Hodges v. Howard*, 5 R. I. 149. The written contract drawn up by the plaintiffs, and sent by them to the defendant on the 28th of June, and containing the defendant's name at the beginning, if within the authority conferred upon them by him, was not prepared for a complete contract or memorandum, but as a form to be afterwards signed by him, and had no effect as a contract or memorandum until so signed: *Sanborn v. Sanborn*, 7 Gray, 142; *Caton v. Caton*, L. R. 2 H. L. 127.

On Sunday, the 2d of July, the parties met by the defendant's request at Newport, in the state of Rhode Island; the defendant signed one part of the contract, and delivered it, with the check sued on, to the plaintiffs, and the plaintiffs received the same, and delivered to the defendant the other part of the contract, which had been signed some days before by their principal, the owner of the estate. Early on Monday morning, the defendant gave notice to the plaintiffs that he would not complete the contract, and should stop payment of the check, as he immediately did. The right of the plaintiffs to recover upon the check so given, therefore, depends upon the validity of the transactions on Sunday, which were the only consideration for the check.

By the law of Rhode Island, as of England and of this commonwealth, a person who has made a contract in violation of the statutes for the observance of the Lord's day cannot maintain an action upon it: *Allen v. Gardiner*, 7 R. I. 24, 25; *Day v. McAllister*, 15 Gray, 433; Metcalf on Contracts, 255-258. The statute of Rhode Island, like our own earlier statutes, is taken from the English statute of 29 Car. II., c. 7, sec. 1, and does not, like our present statute, prohibit any one from doing on the Lord's day, without necessity or charity, "any manner of labor, business, or work," but only "any labor or business or work of his ordinary calling": *Bennett v. Brooks*, 9 Allen, 119. Business not within one's ordinary calling is not made unlawful by the statute of Rhode Island; and it was ruled by the judge presiding in the superior court, rightly. we have no doubt, that the purchase of a dwelling-house for the personal occupation of the defendant and his family, the signing of a contract therefor, and the making and delivery of a check in part payment, were not within the ordinary calling of the defendant, in the sense of this statute.

It has been argued for the plaintiffs that it is no part of the ordinary calling of a broker to receive payment for land sold by him, still less to receive such payment by check; and that the acts done by the plaintiffs on Sunday were not, therefore, within their ordinary calling. But this argument proceeds upon too narrow a construction of the words of the statute, as applied to the evidence in this case. It appeared that the plaintiffs were real estate brokers, and were employed as such by the owner of the estate in question, made the contract for the sale, and were intrusted, for the purpose of delivering it, with one part of the contract, signed by their principal, and stating the amount named in this check to have been duly paid. This evidence would warrant the inference of fact that they were authorized by their principal to deliver the contract and receive payment. This court has no more power, upon a bill of exceptions, to revise, in matter of fact, the finding of the judge to whom, by the waiver of a trial by jury, the case has been submitted in the court below than the verdict of a jury: Gen. Stats., c. 129, secs. 66, 67. It is as much a part of the ordinary calling of a broker to receive and carry out the special instructions of his principal in relation to property which he is employed to sell as it is to do whatever is embraced in the general authority arising out of his employment as a broker. The special instructions and the general authority are both given to him as a broker, and according to the ordinary mode of conducting his business. It is immaterial whether the plaintiffs had or had not authority to receive payment by check; for whether they sue upon the check itself, or for an equal amount of money as not having been paid according to the contract, the only consideration of the promise declared on is the delivery of a contract by an act within their ordinary calling, and so within the prohibition of the statute. To say, as suggested in behalf of the plaintiffs, that a contract should not be held void if made through an agent which would have been valid if made by the owner of the estate in person, would leave professional agents free to pursue their ordinary callings on the Lord's day. A broker or factor is commonly employed to do something which is not within the ordinary calling of his principal, but is within his own ordinary calling. A man who follows his ordinary calling as agent for others is not less within the words of the statute, or the evils which it was intended to prevent, than one who follows his ordinary calling on his own account. The

fact that the parties to this action met on the Lord's day at the defendant's request does not estop him to set up this defense. The plaintiffs, in meeting the defendant on that day, were in equal fault with the defendant, who requested them so to meet him; indeed, more in fault, inasmuch as dealing in real estate was their ordinary calling, and was not his, and the plaintiffs were therefore acting in direct violation of the statute: *Fennell v. Ridler*, 8 Dru. & R. 204; S. C., 5 Barn. & C. 406; *Smith v. Sparrow*, 12 Moore, 266; S. C., 4 Bing. 84; 2 Car. & P. 544.

In the only reported case in Rhode Island upon this subject, the delivery of a release by a creditor to an assignee under a voluntary assignment was held not to be within the statute, for the reason that it was, in the words of the court, "an act out of and beyond the sphere of his ordinary business, as was the assignment itself which required it": *Allen v. Gardiner*, 7 R. I. 22.

Exceptions overruled.

MEMORANDUM REQUIRED BY STATUTE OF FRAUDS OF CONTRACT RELATING TO LANDS, WHAT MUST STATE: See *Farwell v. Mather*, 87 Am. Dec. 641, and note collecting prior cases; *Boardman v. Spooner*, 90 Id. 196.

VALIDITY OF CONTRACTS MADE ON SUNDAY: See *Smith v. Wilcox*, 82 Am. Dec. 302, and note; *Brimhall v. Van Campen*, 82 Id. 118; *Finley v. Quirk*, 86 Id. 93; *Merritt v. Earle*, 86 Id. 292; *Love v. Wells*, 87 Id. 375. Where a statute prohibits any one from doing on the Lord's day "any labor or business or work of his ordinary calling," one party cannot sue upon a contract made by him on the Lord's day, in the exercise of his ordinary calling, even if it is not within the ordinary calling of the other, and the parties met on that day at the request of the latter: *Cranston v. Goss*, 107 Mass. 442. If an agent who is authorized to accept an instrument of guaranty, which is to take effect upon delivery and acceptance, does so on the Lord's day, the instrument is invalid, although it bears date of a secular day, and the principal has no personal knowledge of the unlawful act: *Moseley v. Hatch*, 108 Id. 518; and the execution of a promissory note as surety on Sunday, though delivered by the principal on a week day to the payee, who had no knowledge that the note had been so signed by the surety, is void: *Parker v. Pitts*, 73 Ind. 609. The principal case is cited to the foregoing propositions.

MERRIAM v. HASSAM.

[14 ALLEN, 516.]

POSSESSION MUST BE REGARDED AS ADVERSE BOTH TO TRUSTEE AND OBTUL QUE TRUST, and the time which would bar the legal right is equally effectual to bar the equitable right, where the trustee sells the trust estate to a purchaser for value, with warranty, and without any intimation in the deed of conveyance of a subsisting trust, and the vendee enters and occupies the estate, doing no act which recognizes in any manner the existence of the trust, and there is no fraud or concealment, and the *cestui que trust* is under no disability.

BILLS in equity, filed March 15, 1866, by Emily Merriam, formerly Emily Clark, against the administrator and heirs of Andrew J. Allen, to establish a trust. The facts are fully stated in the opinion.

C. M. Ellis, for the plaintiff.

J. G. Abbott and D. H. Mason, for the defendants.

By Court, HOAR, J. The land upon which the plaintiff seeks to establish a trust in her favor was in 1806 the property of her mother, Mrs. Clark, subject to an estate for life in Mrs. Ruth Mackay. Mrs. Clark's title was derived from her father and brother; and her husband, the plaintiff's father, had no interest in the estate. In contemplation of a second marriage, she made to her brother the deed of trust of July 18, 1811, which is the foundation of the plaintiff's claim. That deed recited, as the grantor's object and purpose, "so to dispose of my property as that I may secure to myself maintenance, and to place it in such a situation that my daughter, Emily Clark, may not be deprived of such share and portion of my estate as I have received from the estate of my late husband, her father"; and "confiding in the affection, honor, and integrity" of the grantee, conveyed to him all her real and personal estate, "trusting in the just and proper application of all the income and profits of my said property, either to relieve my necessities, or to the use and benefit of my said daughter."

Assuming that this instrument created a technical trust, it is obvious that it was very inartificial, and such as to present difficulties of construction. Whether the trustee took an estate in fee, or for his own life, or for the life of the grantor, or for her married life, or the joint lives of herself and her daughter; whether the principal or only the income of the property put in trust was made subject to the trust; whether in construing the word "necessities" it should be held to have

the same force and effect as the word "maintenance"; and whether either, under the circumstances of the case, might not be taken to include something more than a supply of the merest physical wants, and even extend to any proper uses of money by a person in Mrs. Clark's condition in life; and finally, whether the trust for the daughter would include more than the property which came from her father, and whether, therefore, it would include the land now in controversy,—are all questions which, upon the language of the deed, admit of discussion, and some of them would deserve the serious consideration of the court, if the decision of the case depended on them.

But the statute of limitations furnishes a complete and decisive bar to the suit. The plaintiff became of age in May, 1825. She was married in 1829, and became a widow in 1832. For thirty-four years before the filing of the bill, she had been under no disability to ascertain and vindicate her rights. The life estate of Mrs. Ruth Mackay terminated in 1832. John Mackay, the original trustee, conveyed the estate to Ruth Mackay, to be held by her upon the same trusts on which he had held it in 1818; and Ruth Mackay reconveyed to Mrs. Flagg (formerly Mrs. Clark) in 1823, by a deed which recited that the grantee was "desirous of holding said estate in the same way and manner she held the same before the conveyance by her." Mrs. Flagg took her title, of course, with full notice of the trust, whatever it was; and the deed from Ruth Mackay was merely a quitclaim. But the recital showed the intention to put the estate into her hands to be held in the same manner as it was held before the trust was created.

When, therefore, in 1824, Mrs. Flagg and her husband joined in the conveyance of the land now in question to Andrew J. Allen, by a deed with full covenants of warranty, and for a full consideration, and he proceeded to enter upon and hold the same without any claim by or on behalf of any person against him, and continued in the undisputed sole possession and enjoyment thereof till his death in 1864, applying the rents and income to his own use, we think it very clear that his title and possession were adverse to both trustee and *cestui que trust*. From the death of Ruth Mackay in 1832, the right of the plaintiff was as complete as it is now, or has been at any time intervening. She became a widow in that year, and no disability has existed since. It is agreed as a fact that she had no actual knowledge of the creation or existence of a

trust in her favor. But while this would be an answer to a defense based upon laches or acquiescence merely, we cannot find in it a sufficient objection to the operation of the limitation. The deed which created the trust was upon record, and she had the means of ascertaining her rights under it by the use of due diligence. She now claims under that recorded deed, and the registry gave her the same notice that it gave to Mr. Allen. If she seeks to charge him as trustee because he purchased the estate with notice of the trust, the constructive notice was the same to all who claim under the same instrument.

The rule is stated generally in the text-books, and is found in many adjudged cases, that no lapse of time is a bar to a direct trust; and it is undoubtedly true, if taken with the proper qualifications. The possession of the trustee not being adverse to the *cestui que trust*, as between them there is no limitation of time, unless there is a clear repudiation of the trust, brought home to the party so as to require him to act as upon a clearly asserted adverse title: *Baker v. Whiting*, 3 Sum. 486; *Kane v. Bloodgood*, 7 Johns. Ch. 90 [11 Am. Dec. 417]. But where the trustee sells the trust estate to a purchaser for value, with warranty, and without any intimation in the deed of conveyance of a subsisting trust; and the vendee enters and occupies the estate, doing no act which recognizes in any manner the existence of the trust; and there is no fraud or concealment; and the *cestui que trust* is under no disability; the possession must be regarded as adverse both to the trustee and the *cestui que trust*; and the time which would bar the legal right is equally effectual to bar the equitable right: 2 Sugden on Vendors, 610; *Attorney-General v. Proprietors of Federal Street Meeting-house*, 3 Gray, 1.

Bills dismissed with costs.

STATUTE OF LIMITATIONS IN CASE OF EXPRESS TRUSTS: See *Webster's Ex'rs v. Newbold*, 82 Am. Dec. 487, and note collecting prior cases. The principal case is cited in *Jones v. McDermott*, 114 Mass. 403, to the point that when the relation of trustee and *cestui que trust* has been shown to exist, there must be evidence of a repudiation of it, and of an intention to hold the property adversely, before the statute will begin to run.

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3. DEBTOR IS BOUND TO KNOW AUTHORITY OF THIRD PERSON TO WHOM HE PAYS MONEY on account of his creditor, and if, failing to ascertain such authority, he makes the payment, it is at his own risk. *Id.*
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2. OWNER OF PROPERTY OFFERED FOR SALE AT AUCTION HAS RIGHT TO PRESCRIBE MANNER, conditions, and terms of sale, and where they are reasonable and made known to the buyer, they are binding upon him. *Id.*
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2. **MISDELIVERY OF PROPERTY BY ANY BAILER TO UNAUTHORIZED PERSON IS OF ITSELF CONVERSION**, rendering the bailee liable in trover, without regard to the question of due care or degree of negligence. *Hall v. Boston etc. R. R. Co.* 783.

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COMMON CARRIERS.

1. **NOTHING EXCEPT ACT OF GOD OR PUBLIC ENEMY WILL EXCUSE COMMON CARRIER** for loss of goods intrusted to him for transportation, and he cannot, in Georgia, limit that legal liability by any notice given either by publication or by entry on receipts given or tickets sold; but he may limit his liability by express contract, independent of his receipt, fairly made between the parties. *Southern Express Co. v. Purcell*, 53.
2. **WHERE EXPRESS CONTRACT IS ENTERED INTO BETWEEN COMMON CARRIER AND SHIPPER** of goods, limiting the former's legal liability for loss thereof, evidence tending to show that the loss occurred through the shipper's failure to perform his contract, and not through the carrier's negligence, is admissible on behalf of the carrier. *Id.*
3. **COMMON CARRIERS ARE REGARDED AT COMMON LAW AS INSURERS OF GOODS DELIVERED TO THEM FOR TRANSPORTATION**, except when their loss is occasioned by the act of God or the public enemy. *Fildbrown v. Grand Trunk R'y Co.*, 606.
4. **COMMON CARRIERS MAY RESTRICT THEIR COMMON-LAW LIABILITY** by notice brought home to the owner of goods before or at the time of delivery to them, if such notice be assented to expressly or impliedly by the owner. *Id.*
5. **NOTICE RESTRICTING CARRIER'S COMMON-LAW LIABILITY, GIVEN TO PERSON** who was simply directed by the owner to deliver the goods to the carrier, is insufficient to bind the owner, in the absence of all knowledge of and assent to such notice on the part of the latter. *Id.*
6. **OWNERS OF GOODS ARE PRESUMED TO CONTRACT WITH CARRIERS UNDER THEIR COMMON-LAW LIABILITY**, and it is for the carrier to show any qualification of his responsibility. *Id.*

7. COMMON CARRIER CANNOT STIPULATE AGAINST HIS OWN GROSS NEGLIGENCE, or that of his employees, or against willful default on his or their part. And it is such gross negligence as a railroad company cannot stipulate against for one of its conductors to refuse to apply water to hogs that are being transported in its cars, after being requested so to do by the owner of the hogs, where water for that purpose was convenient and abundant, and several of the hogs died by reason of such refusal. *Illinois Cent. R. R. Co. v. Adams*, 85.
8. LIMITATION OF COMMON CARRIER'S LIABILITY BY EXPRESS CONTRACT must be reasonable in itself, and not such as to operate as a snare or fraud upon the public. *Adams Express Co. v. Reagan*, 332.
9. CONDITION THAT CARRIER SHOULD NOT BE LIABLE FOR LOSS, unless a claim therefor should be presented within thirty days from the date of the receipt, held to be unreasonable and void, in a contract to carry a package from Indiana to Georgia, during the war, and when transportation was much interrupted. *Id.*
10. MEASURE OF DAMAGES AGAINST CARRIER FOR DELAY IN DELIVERING GOODS. — When a carrier contracts to deliver goods, and by his neglect they are not delivered at the time and place when and where they should have been delivered, and at the time of their delivery there is a diminution of their market value, the carrier is liable for the loss thus arising. The difference in value at the time of delivery and when the goods should have been delivered constitutes the measure of damages, and is a material element proper for the consideration of the jury in assessing the damages. *Weston v. Grand Trunk R'y Co.*, 552.
11. CONSIGNOR OF PROPERTY IN TRANSITU HAS RIGHT TO DIRECT CHANGE IN ITS DESTINATION, and have it delivered to a different consignee; and the carrier is bound to obey such direction. *Strahorn v. Union Stock Yard etc. Co.*, 142.
12. RAILROAD COMPANY IS LIABLE AS COMMON CARRIER FOR INJURIES TO CARS OF CONNECTING COMPANY while they are in transit over its road, and which it receives with their passengers and freight into its exclusive custody and control. *Vermont etc. R. R. Co. v. R. R. Co.*, 785.
13. RAILROAD COMPANY IS LIABLE TO CONNECTING RAILROAD COMPANY FOR INJURIES TO CARS OF LATTER arising from a defective condition of the road of the former, whether attributable to negligence or not, if the contract be construed to include cars, where the former company agreed to draw over its road the cars of the latter with their passengers and freight, and the latter agreed to save the former harmless from all claims and damages arising from any injury to passengers, or loss of or damage to baggage, goods, and freight, while in transit over the same, "unless such injury, loss, or damage shall be clearly shown to arise from or be occasioned by the negligence or default" of the transporting company, "or from some defect in the road." *Id.*
14. COMPLAINT STATING FACTS, AND CHARGING RAILROAD COMPANY GENERALLY FOR LOSS OF BAGGAGE, IS GOOD; and if the company is liable, either in the capacity of common carrier or as warehouseman, the plaintiff is entitled to recover. *Warner v. Burlington etc. R. R.*, 389.
15. RAILROAD COMPANY IS LIABLE AS WAREHOUSEMAN FOR LOSS OF BAGGAGE, where it receives and undertakes to convey a passenger's trunk by a subsequent train to a given point, but puts it in the common passenger-room at the place of destination, instead of the baggage-room kept for that purpose, where it is broken open by burglars and rifled of its con-

- tents before the passenger has a reasonable time, after its arrival, in which to receive it. *Id.*
16. PASSENGER HAS REASONABLE TIME AFTER ARRIVAL OF BAGGAGE SENT ON SUBSEQUENT TRAIN IN WHICH TO RECEIVE IT; and even if the liability of the railroad company ceases, unless the passenger exercises the utmost watchfulness in calling for his baggage, it would still be liable as a warehouseman, at least for a reasonable time. *Id.*
 17. IF RAILROAD COMPANY, BY ITS AGENT, ACCEPTS AND UNDERTAKES TO CARRY AND DELIVER PASSENGER'S TRUNK ON SUBSEQUENT TRAIN, IT IS LIABLE, whether the agent had the authority or not, in the first instance, to bind the company by the agreement to obtain and forward the baggage. The agent's failure to forward the trunk might not make the company liable in case of loss, but it would be liable after assuming the responsibility of carrying it. *Id.*
 18. WHERE PASSENGER PAYS HIS FARE, AND RAILROAD COMPANY, BY ITS AGENT, UNDERTAKES TO DELIVER HIS TRUNK BY SUBSEQUENT TRAIN, the company takes upon itself the ordinary liabilities that are assumed by such companies when the passenger goes upon the same train. *Id.*
 19. SAME RULES OF CARE AND DILIGENCE ON PART OF RAILROAD COMPANY APPLY WHETHER BAGGAGE IS FORWARDED ON SAME, PRECEDING, OR SUBSEQUENT TRAIN, where the passenger has paid his fare, and his baggage is sent forward pursuant to an agreement, and as a part of the consideration moving from the company for the fare prepaid by the passenger. *Id.*
 20. DUTY OF PASSENGER CARRIER DOES NOT EXTEND TO IMPRISONMENT OF PASSENGER, so as to prevent him from voluntarily exposing himself to needless peril. *Indianapolis etc. R. R. Co. v. Rutherford*, 336.
 21. PASSENGER'S REFUSAL TO SURRENDER HIS TICKET TO RAILROAD CONDUCTOR WHEN DEMANDED does not constitute the same offense as the refusal to pay fare, and the statutory prohibition against the expulsion of a passenger for non-payment of fare, except at a regular station, does not apply to the former case. *Illinois Cent. R. R. Co. v. Whittemore*, 138.
 22. RAILROAD COMPANY MAY EXPEL PASSENGER FROM ITS TRAIN, AT PLACE OTHER THAN REGULAR STATION, for the violation of any reasonable rule other than that of non-payment of fare. *Id.*
 23. STATUTE FORBIDS EXPULSION OF PASSENGER AT PLACE OTHER THAN REGULAR STATION, ONLY IN CASE OF REFUSAL TO PAY FARE; and a passenger's neglect to purchase a ticket before entering a railroad train, when required by the rules of the company to do so, amounts in substance to a refusal to pay fare, and justifies an expulsion only at a regular station. *Id.*
 24. RAILROAD COMPANY HAS RIGHT TO REQUIRE OF ITS PASSENGERS COMPLIANCE WITH ALL REASONABLE RULES tending to promote comfort, convenience, good order, and behavior, and to secure the safety of its trains, and to enable the company to conduct its business as a common carrier with advantage to the public and to itself. *Id.*
 25. RAILROAD COMPANY IS BOUND TO CARRY PASSENGER who observes all reasonable rules of the company. *Id.*
 26. RAILROAD COMPANY HAS COMMON-LAW RIGHT TO EXPEL PASSENGER FROM ITS TRAIN, where he has wantonly disregarded any reasonable rule; but the company must not select a dangerous or inconvenient place, and must use no more force than may be necessary for the expulsion; and this right has been restricted by statute in cases of non-payment of fare only. *Id.*

27. RULE OF RAILROAD COMPANY REQUIRING PASSENGERS TO SURRENDER THEIR TICKETS to the conductor, when demanded, is a reasonable one and may be enforced. *Id.*
28. COURT MUST DETERMINE WHETHER RULE ADOPTED BY RAILROAD COMPANY IS REASONABLE ONE. Such question is purely one of law, and must be determined by the court, and not the jury, although it is proper for the court to admit testimony as to the necessity of such rule. *Id.*
29. RAILROAD COMPANY MUST RESPOND IN DAMAGES IF IT USES UNNECESSARY VIOLENCE in expelling passenger who has wantonly disregarded any of its reasonable rules. *Id.*
30. PASSENGER ON RAILROAD TRAIN CAN ONLY BE EXPELLED AT REGULAR STATION for violating a rule of the company requiring passengers to purchase tickets before entering the train. The willful neglect to comply with that rule and the refusal to pay the fare are substantially the same offense against the rights of the road, and the penalty for the one is no greater than that for the other. *Illinois Cent. R. R. v. Sutton*, 81.
31. RAILROAD COMPANY IS LIABLE FOR EXPELLING PASSENGER AT PLACE OTHER THAN REGULAR STATION, where the passenger, on being informed just before the train started of the rule of the company requiring tickets to be purchased before entering the cars, seeks to buy a ticket, but finds the office closed, and afterwards offers to pay his fare to the conductor, who refuses to receive it. *Id.*
32. RAILROAD COMPANY IS NOT REQUIRED TO KEEP OPEN ITS TICKET-OFFICE for sale of tickets to passengers beyond advertised time fixed for the departure of trains; and *Chicago etc. R. R. v. Parks*, 18 Ill. 460, S. C., 68 Am. Dec. 562, and *St. Louis etc. R. R. Co. v. Dalby*, 19 Ill. 353, are not to be considered as holding that such company must keep its office open for that purpose until the actual departure of the train. *St. Louis etc. R. R. Co. v. South*, 103.
33. RAILROAD COMPANY IS REQUIRED TO KEEP OPEN ITS TICKET-OFFICE FOR SALE OF TICKETS to passengers for a reasonable time before the departure of each train, and up to the advertised time for its departure, but not up to the time of its actual departure. *Id.*
34. RAILROAD COMPANY IS REQUIRED TO FURNISH CONVENIENT AND ACCESSIBLE PLACE FOR SALE OF TICKETS, and to afford the public a reasonable opportunity to purchase them; but parties who will not avail themselves of it are alone at fault, and must pay the extra fare or be ejected from the train on refusal to pay it. *Id.*
35. RAILROAD COMPANY'S RIGHT TO DISCRIMINATE IN ITS FARE between those who purchase tickets and those who do not is just and reasonable, but is dependent on the fact that a reasonable opportunity has been given to obtain tickets at the lowest rate of fare. *Id.*
36. RATES OF FARE OF RAILROAD COMPANY NEED NOT BE FIXED by board of directors, and appear on the record of their proceedings. Agents other than the directors may be empowered to regulate such matters. *Jeffersonville R. R. Co. v. Rogers*, 276.
37. RAILROAD COMPANY MAY DISCRIMINATE IN ITS RATES OF FARE in favor of persons who purchase tickets before entering the cars. *Id.*
38. REGULATION MAKING DISCRIMINATION IN PASSENGER FARES in favor of persons purchasing tickets before entering the cars imposes upon the railroad company the obligation to afford passengers the opportunity to avail themselves of the discrimination; and if this opportunity is not offered, the regulation is not binding, and a passenger who after tender-

- ing the regular ticket rate to the conductor is expelled from the train may recover from the company. *Id.*
39. PASSENGER WHO REFUSES TO PAY FARE MAY BE EXPELLED BETWEEN STATIONS where the charter of the railroad company is silent upon the subject, and there is no general statute requiring the expulsion to be made at a station. *Id.*
 40. MEASURE OF DAMAGES WHERE PASSENGER WHO HAD NO OPPORTUNITY OF PURCHASE TICKET is expelled from the cars upon his refusal to pay a higher rate of fare is not confined to the difference between the two rates of fare, but extends to the consequences of the expulsion, which was purely wrongful. *Id.*
 41. IF RAILROAD COMPANY REGULARLY CARRIES PASSENGERS BY FREIGHT TRAIN, and holds itself out to the public as so doing, it thereby becomes a common carrier of passengers by such freight train, and has no more right to expel a passenger therefrom without cause than from a regular passenger train. *Chicago etc. R. R. Co. v. Flagg*, 133.
 42. RAILROAD COMPANY HAS POWER TO MAKE ALL REASONABLE RULES FOR GOVERNMENT OF ITS TRAINS; and may, as to certain classes of trains, require tickets to be purchased before allowing passage to be taken thereon. *Id.*
 43. PASSENGER MAY BE EXPELLED AT ANY REGULAR STATION, BUT ONLY AT SUCH STATION, where he has knowingly disregarded the rule requiring tickets to be purchased before taking passage on a railroad train. His willful neglect to comply with the rules in this particular would be like a refusal to pay the fare, and could place the passenger in no worse position. *Id.*
 44. WHEN RAILROAD COMPANY REQUIRES TICKETS TO BE PURCHASED AT STATION, FACILITIES MUST BE FURNISHED to the public by keeping open the ticket-office a reasonable time prior to the hour fixed by the timetable for the departure of its trains. *Id.*
 45. FAILURE OF RAILROAD COMPANY TO GIVE REASONABLE OPPORTUNITY FOR PURCHASE OF TICKET, by one who desires to take passage on one of its trains, gives such person a right to enter and be carried to his place of destination on payment of the regular fare to the conductor; and his expulsion, under such circumstances, would be unlawful. *Id.*
 46. PASSENGER CANNOT BE EXPELLED AT PLACE OTHER THAN REGULAR STATION, even where he has willfully neglected to purchase a ticket as required before entering the train. *Id.*
 47. "REGULAR STATION" MEANS USUAL STOPPING-PLACE FOR DISCHARGE OF PASSENGERS. *Id.*
 48. WATER-TANK, EVEN IF "USUAL STOPPING-PLACE FOR TRAINS," IS NOT "REGULAR STATION," within the spirit of the law. *Id.*
 49. "REGULAR STATION" CANNOT BE CREATED BY LOCAL USAGE; thus a local usage adopted by persons of getting on or off a train, for their own convenience, at a place other than the regular station, does not make such place a "regular station" for the discharge of passengers. *Id.*
 50. PASSENGER WRONGFULLY EXPELLED FROM RAILROAD TRAIN MAY RECOVER MORE THAN NOMINAL DAMAGES, even though he has received no personal injuries to his body by reason of such expulsion, and has suffered no pecuniary loss. *Id.*
 51. ELEMENTS OF DAMAGE FOR WRONGFUL EXPULSION FROM RAILROAD TRAIN. The jury, in estimating the damages, may consider not only the annoyance, vexation, delay, and risk to which the person was subjected, but

also the indignity done to him by the mere fact of expulsion; and this, although the proof shows that the conductor acted in good faith, without violence or insult, and that no actual damage was sustained. *Id.*

51. PHRASE "USUAL STOPPING-PLACE," IN STATUTE CONCERNING RAILROAD LAW, MEANS a regular station for passengers to get on and off the train. *Id.*
53. COURT WILL JUDICIALLY NOTICE DUTIES OF COMMON CARRIER annexed by law to the contract to carry; and in an action by a passenger against a railroad company for injuries received in alighting, the complaint need not allege the duty of the company to provide a safe mode of exit from the car. *Evansville etc. R. R. Co. v. Duncan*, 322.
54. COMPLAINT IN ACTION BY PASSENGER AGAINST RAILROAD COMPANY alleging that the plaintiff was carried to his destination in a box-car which had no steps for the safe descent of passengers, and which was stopped before it reached the platform at the station, and that the plaintiff was required by the conductor to leap from the car to the ground, whereby he received injuries, is not demurrable on the ground that the injury appears to have resulted from rash conduct of the plaintiff. *Id.*
55. INSTRUCTION IN ACTION AGAINST RAILROAD COMPANY FOR INJURIES RECEIVED IN JUMPING FROM CAR, that the defendant would be liable if the injuries resulted from the want of proper skill and care on the part of the conductor, is not erroneous, taken in connection with another instruction that if the plaintiff was guilty of negligence in jumping from the car, whereby she was injured, then she could not recover, even if the defendant was also guilty of negligence. *Id.*
56. RAILROAD COMPANY IS NOT BOUND TO RECEIVE UNUSUAL NUMBER OF PASSENGERS, beyond what it may be bound to provide with safe accommodations; but if it does receive them without condition or notice of its inability to provide for their safety, it assumes all the obligations usually incumbent upon a carrier of passengers. *Id.*
57. PASSENGER CARRIED IN FREIGHT-CAR FROM WHICH NO MEANS OF DESCENT IS PROVIDED, who leaps from the car after the train has stopped at the passenger's destination, and is thereby injured, is not guilty of negligence such as will relieve the carrier from liability, merely because she was not in peril, or had not reason to believe that she was in peril; and an instruction to this effect is properly refused for not containing the further element that the circumstances were such that a person of ordinary prudence would have apprehended danger from the leap. *Id.*
58. PASSENGER WHO TO PREVENT BEING CARRIED BEYOND HER DESTINATION VOLUNTARILY JUMPED FROM CAR, from which no means of descent were provided, after the train had stopped at the station, and was injured thereby, was guilty of contributory negligence, since the evidence showed that the leap was dangerous, that she considered it to be such, and that she was warned not to make it. *Id.*
59. RAILROAD COMPANY, BY ADVERTISING TIMES WHEN ITS TRAINS RUN, AGREES WITH HOLDERS OF TICKETS that its trains will run at the times advertised, but with an implied reservation of a power to change the times upon giving reasonable notice. *Sears v. Eastern R. R. Co.*, 780.
60. REASONABLE NOTICE OF CHANGE OF TIME, AS ADVERTISED IN NEWSPAPERS, WHEN RAILROAD TRAIN WILL RUN, IS NOT GIVEN to one who previously purchased tickets in accordance with the advertisement, by posting up handbills in the cars and stations, without his knowledge, announcing the change. *Id.*

61. **EXPRESS CONTRACT CANNOT BE CONTROLLED OR VARIED BY USAGE;** and therefore, where a railroad company advertises the times when its trains will run, and sells tickets accordingly, evidence of a usage of the company to change the times of running trains, without giving reasonable notice thereof, is inadmissible. *Id.*

CONDITIONS.

See COVENANTS, 1.

CONFLICT OF LAWS.

1. **COMITY IS OVERRULED BY POSITIVE LAW,** and it is only in the silence of any particular rule, affirming, denying, or restraining the operation of foreign laws, that courts of justice presume a tacit adoption of them by their own government. *Smith v. McAtee*, 641.
2. **NO STATE WILL SUFFER LAWS OF ANOTHER TO INTERFERE WITH HER OWN;** and in the conflict of laws, when it must often be a matter of doubt which shall prevail, the court which decides will prefer the law of its own country to that of the stranger. *Id.*
3. **COURTS OF STATE HAVE PERFECT JURISDICTION OVER ALL PERSONAL PROPERTY** as well as real, within its limits, belonging to a married woman, and they have a right to protect both from the debts of the husband; if, therefore, the legislative enactments of one state in regard to the property of the wife conflict with the laws of another state in which the husband and wife are domiciled, it cannot be made a question in the courts of the former which shall prevail; but where there is no constitutional barrier, these courts are bound to observe and enforce the statutory provisions of their own state. *Id.*
4. **CREDITOR SEEKING TO SUBJECT TO PAYMENT OF HUSBAND'S DEBT** a fund held for the sole and separate use of the wife will be governed by the *lex fori*, and such judgment will be rendered as that law authorizes. *Id.*
5. **DEED IS NOT UPON ITS FACE OR BY ITS PROVISIONS INVALID BY LAWS OF VIRGINIA** which is executed in that state by a corporation thereof, purporting to convey all its property to trustees for the benefit of its creditors, and reserving to itself the enjoyment of the property under the title to the trustees from the 20th of September to the 1st of November following, and longer if the trustees should not be required to take possession by one or more of the creditors thereby secured; requiring the trustees to pay out of the trust fund all debts that should become due from the grantor to its officers and agents between those dates, while it should be using its property under said reservation; and also requiring the trustees to pay out of the trust funds all debts which the grantor, an express and transportation company, might incur to railroad companies for transportation during said period, over and above the net receipts for such transportation; and reserving to the grantor absolutely all tolls and compensation for the transportation of express matter not then delivered to consignees, nor transported, although under existing contracts. *Baltimore etc. R. R. Co. v. Glenn*, 688.
6. **NO LAW OR RULE OF CONSTRUCTION IN MARYLAND PROHIBITS ENFORCEMENT OF CONTRACT** not made in this state, according to the law of the place where it was made, although citizens of Maryland, from reasons of state policy, may not be permitted to make a similar contract here. *Id.*

CONSTITUTIONAL LAW.

1. LEGISLATIVE ACTS ARE PRESUMED TO BE CONSTITUTIONAL, and their effect and operation can only be impeded by judicial powers, when they infringe some of the provisions of the constitution, or violate the vested rights of the people. Legislative acts are never pronounced unconstitutional or void in doubtful cases. *Davis v. Helbig*, 646.
2. LEGISLATIVE ACT EMPOWERING COURT OF EQUITY TO DECREE PARTITION of real property in a particular case is constitutional and valid in Maryland. *Id.*
3. LEGISLATIVE ACT EMPOWERING COURT OF EQUITY TO DECREE SALE OF PROPERTY in a particular case, provided they are satisfied by proof that it will be advantageous to the infant owners, confers jurisdiction on the court in Maryland. *Id.*
4. CONSTITUTIONAL POWER OF MARYLAND LEGISLATURE TO DECREE SALE OF MINOR'S REAL ESTATE in particular cases is undoubted. *Id.*
5. CONVERSION OF MINOR'S REALTY INTO PERSONALTY DOES NOT DEPRIVE the minor of his property in any way, and hence the legislature may provide for such conversion in particular cases. *Id.*
6. TITLES OF BONA FIDE PURCHASERS OF REAL PROPERTY CAN ONLY BE AVOIDED for substantial legal defects, and will not be affected by irregularities in the proceedings. *Id.*
7. GEORGIA STAY LAW OF DECEMBER 13, 1866, IMPAIRS OBLIGATION OF CONTRACTS made prior to its enactment, because it prohibits a plaintiff from exercising his legal right to enforce a defendant's legal obligation to perform his contract as the same existed under the old law creating and defining that legal obligation at the time the contract was made, under the penalty of being a trespasser; and is therefore in violation of the constitution of the United States and of the state of Georgia. *Aycock v. Martin*, 56.
8. KENTUCKY AMNESTY ACT OF FEBRUARY 28, 1867, IS UNCONSTITUTIONAL in so far as it affects or was intended to affect civil remedies for private wrongs. *Terrill v. Rankin*, 500.
9. PRESIDENT OF UNITED STATES HAS NO RIGHTFUL POWER IN TIME OF PEACE TO CAUSE ARREST OF CITIZEN of one state without process, and without any charge of crime legally preferred, and convey him to another state, and there imprison him, without judicial writ or warrant, in a military fortress. *Johnson v. Jones*, 159.
10. CITIZEN HAS RIGHT TO HIS PERSONAL LIBERTY, except when restrained of it upon a charge of crime, and for the purpose of judicial investigation, or under the command of the law pronounced through a judicial tribunal. *Id.*
11. STATE MAY REGULATE HER DOMESTIC CONCERNS, AND PRESCRIBE REMEDIES, including rules of evidence, in her own courts, except where prohibited by her own constitution or that of the United States. *Bowlin v. Commonwealth*, 468.
12. INDIVIDUALS RELY FOR PROTECTION OF THEIR RIGHTS ON LAW, and not upon regulations and proclamations of the departments of government, or officers who have been designated to carry the laws into effect. *Baty v. Sale*, 128.
13. WHEN JUSTICES OF INFERIOR COURT SEIZE AND TAKE POSSESSION OF PERSON'S PROPERTY, WITHOUT HIS CONSENT, for the purpose of providing a small-pox hospital, and occupy it for that purpose, the owner may maintain an action of trespass against them in their individual capacity, AM. DEC. VOL. XCII-62

for such seizure and occupancy, notwithstanding the inferior court had power and authority to provide small-pox hospitals. The authority to establish small-pox hospitals does not give the right to take the private property of the citizen for that purpose. *Marble v. Brown*, 73.

CONTRACTS.

1. **BINDING FORCE AND COERCIVE POWER OF LAW APPLICABLE TO CONTRACT** at the time it was made constitute the obligation of the contract. This obligation, which is a legal and not a merely moral one, does not inhere in the contract itself, *proprio vigore*, but in the law applicable to the contract. *Aycock v. Martin*, 56.
2. **INTENTION OF PARTIES, WHEN NOT INCONSISTENT WITH LEGAL RULES, WILL** control in construction of contracts. *Dunbar v. Rawles*, 311.
3. **CONSIDERATION SUFFICIENT TO SUPPORT CONTRACT.** — **ENDOWMENT OF INSTITUTIONS OF LEARNING**; expense, liability, and trouble of officers of such institutions in raising endowments; or the undertaking of such officers to give "free tuition to twenty students forever," — constitute a sufficient consideration upon which to base a contract. *Burlington University v. Barrett*, 376.
4. **CONTRACT, THOUGH NOT STAMPED WITH INTERNAL REVENUE STAMP AT TIME OF EXECUTION, IS** valid and admissible in evidence if the stamp is affixed and canceled, and the penalty paid to the collector of internal revenue, and a note thereof made by him upon the margin of the instrument, before it is offered in evidence. *Cooke v. England*, 618.
5. **ACTION WILL NOT LIE TO RECOVER BACK MONEY SENT BY ONE PERSON TO ANOTHER** with the object of inducing the latter to use his influence to obtain the nomination to a public office of the former without reference to fitness for the position or the public good, and the person receiving the money did not use his influence for the applicant, but against him. *Liness v. Hesing*, 153.
6. **CONTRACT OF SALE IS NOT RENDERED INVALID MERELY BECAUSE SELLER HAD KNOWLEDGE OF ILLEGAL PURPOSE** to which the articles sold were to be put, and the purchaser will be liable for the contract price unless he can show that the seller participated in the intent to commit, or had some interest in, the illegal act. So held where a citizen of the United States, after war had been declared, sold to another a lot of hogs, with knowledge that the latter bought them for the use of the confederate army. *Hedges v. Wallace*, 497.
7. **COMMON REPUTATION IS NOT ADMISSIBLE TO SHOW THAT SELLER OF GOODS, WHICH WERE BOUGHT FOR ILLEGAL PURPOSE, KNEW THE PURPOSE TO WHICH THEY WERE TO BE PUT, NOR TO SHOW HIS INTENTION TO PARTICIPATE IN THE WRONGFUL ACT.** *Id.*
8. **CONTRACT TENDING TO LEND AID TO CONFEDERATE FORCES** during the late Civil War is in direct violation of law, void, and cannot be enforced. *Bowman v. Gonegal*, 537.
9. **COURT WILL NOT LEND ITS AID** to settle disputes relative to contracts reprobated by law. It will notice their illegality *ex officio*, and allow it to be suggested without any plea, and at any stage of the proceedings. *Id.*
10. **CONTRACT MUST HAVE LAWFUL PURPOSE**; and if it have an unlawful cause, or if it is contrary to good morals or public policy, it is void. *Id.*
11. **NOTE, CONSIDERATION FOR WHICH IS CONFEDERATE MONEY, IS AN IMMORAL AND REPROBATED CONTRACT, WHICH CANNOT BE ENFORCED.** *Norton v. Dawson*, 548.

12. CONFEDERATE CURRENCY WAS CREATED TO ASSIST REBELLION against the government, and the giving circulation to it was immoral and against public policy. *Id.*
13. CONTRACTS MADE ON SUNDAY ARE NOT UNLAWFUL IN RHODE ISLAND, unless they are within one's "ordinary calling." *Hazard v. Day*, 790.
14. IT IS NOT WITHIN ONE'S "ORDINARY CALLING," WITHIN MEANING OF RHODE ISLAND STATUTE prohibiting every one from doing "any labor or business or work of his ordinary calling" on Sunday, to purchase a dwelling-house for the personal occupation of himself and family, signing a contract therefor, and making and delivering a check in part payment. *Id.*
15. IT IS WITHIN REAL ESTATE BROKER'S "ORDINARY CALLING," WITHIN MEANING OF RHODE ISLAND STATUTE, prohibiting every one from doing "any labor or business or work of his ordinary calling" on Sunday, to carry out the special instructions of his principal in relation to the property which he is employed to sell, as it is to do whatever is embraced in the general authority arising out of his employment as a broker. *Id.*

See CONFLICT OF LAWS, 6; MARRIED WOMEN, 1, 2; SPECIFIC PERFORMANCE.

CONVERSION.

PERSON IS GUILTY OF CONVERSION WHO SELLS PROPERTY OF ANOTHER, without the owner's authority, although he acts as the agent or servant of one claiming to be the owner, and is ignorant of his principal's want of authority. *Kimball v. Billings*, 581.

CORPORATIONS.

1. DOMICILE OF CORPORATION IS IN STATE BY WHOSE LAW IT IS CREATED, and it cannot have any legal existence out of the boundaries of that state. It must dwell in the place of its creation, and cannot migrate to another sovereignty. *Baltimore etc. R. R. Co. v. Glenn*, 688.
2. CORPORATION CANNOT RESIDE IN TWO STATES AT SAME TIME under the one charter. But a corporation of one state may by its agents make a contract within the scope of its limited powers in a sovereignty in which it does not reside, provided such contract is permitted to be made by the law of the place. *Id.*
3. VALIDITY OF DEED MADE BY CORPORATION CREATED BY LAW OF VIRGINIA must be determined by the laws of that state. If it be legal there, it is so here, unless it violates good morals or is repugnant to some law or policy of this state. If it be fraudulent and void according to the law of Virginia, the fraud attaches to it here, and vitiates it. *Id.*
4. ACTION CANNOT BE MAINTAINED AGAINST CITY FOR PERSONAL INJURY sustained by one while aiding its police officers, at their request made in accordance with a city ordinance, in arresting violent disturbers of the peace. *Cobb v. City of Portland*, 598.
5. DISSOLUTION OF FOREIGN CORPORATION DURING PENDENCY OF SUIT AGAINST, EFFECT OF. — An action against a foreign corporation, having an agency in the state where the action is commenced, is not prevented from proceeding to judgment by a subsequent decree dissolving the corporation and appointing receivers to wind up its affairs, made in the state of its creation, unless it is shown that the corporation is utterly extinct. *Hunt v. Columbian Ins. Co.*, 592.

6. CITY ORDINANCE IS UNREASONABLE, IN RESTRAINT OF TRADE, tends to create a monopoly, and is therefore void, which limits the slaughtering of animals for food, except for packing purposes, to one particular lot of land in the city, owned by one firm, and forbids slaughtering to be done elsewhere under a penalty; and this notwithstanding the ordinance was passed ostensibly as a sanitary regulation, and the charter of the city empowers it to "regulate license, restrain, abate, and prohibit" slaughter-houses. *Chicago v. Rumpff*, 196.
7. CITY MAY PROHIBIT SLAUGHTERING OF ANIMALS IN CITY LIMITS, or may restrict it to designated localities in the city, and prohibit it in others, provided, that in designating a particular quarter for this purpose, it leaves all persons equally free, both to slaughter animals in that quarter and to furnish and rent the places where the animals are slaughtered. *Id.*
8. STATUTE PASSED SUBSEQUENT TO ENACTMENT OF INVALID CITY ORDINANCE, purporting to empower the common council to enforce "any regulation, contract, or law heretofore made upon the subject" concerning which the ordinance deals, but not naming the particular ordinance in question, is not in itself a confirmation of the ordinance so as to validate it. *Id.*
9. TOWN CANNOT BY ITS BY-LAWS CONFER AUTHORITY UPON ITS OFFICERS TO MAKE SALES OF IMPOUNDED ANIMALS, except for penalties incurred and the costs of the proceedings, under the Illinois act of 1861 empowering the electors of towns at their annual town meetings to restrain or prohibit the running at large of certain animals, and to authorize the distraining, impounding, and sale of the same for penalties incurred and the cost of the proceedings. *Poppen v. Holmes*, 186.
10. TO ASCERTAIN WHETHER PENALTY HAS BEEN INCURRED IS PROCEEDING PURELY JUDICIAL in its character, and the power cannot be exercised by the pound-master by virtue of his office, under the Illinois act of 1861 empowering the electors of towns at their annual town meetings to restrain or prohibit the running at large of certain animals, and to authorize the distraining, impounding, and sale of the same for penalties incurred and the cost of the proceedings. *Id.*
11. TOWN CANNOT BY ITS BY-LAWS AUTHORIZE POUND-MASTER TO SELL PROPERTY without a judicial ascertainment that some law has been violated. *Id.*

See ATTACHMENTS, DAMAGES, 8; NEGLIGENCE, 1.

COSTS.

1. APPORTIONMENT OF COSTS UNDER ILLINOIS STATUTE, IN CASE OF APPEAL from a judgment of a justice of the peace, is wholly discretionary with the circuit court, which must take a view of the whole case, ascertain where the justice of it is, and so apportion the costs. *Beckman v. Kreamer*, 146.
2. MOTION FOR RULE ON PLAINTIFF TO FILE SECURITY FOR COSTS COMES TOO LATE after issue joined and the cause has been called for trial. *St. Louis etc. R. R. Co. v. South*, 103.

CO-TENANCY.

1. SEVERAL PERSONS MAY TOGETHER OWN THING WITHOUT BEING CO-TENANTS THEREOF. *McConnell v. Kibbe*, 93.
2. MERE SEVERANCE OF POSSESSION BETWEEN TENANTS IN COMMON MAY BE INFERRED FROM FAR LESS PROOF than would be required to show a sale of land to a stranger. *Tomlin v. Hilyard*, 118.

3. DEFENDANT IN REAL ACTION BETWEEN TENANTS IN COMMON CANNOT GIVE IN EVIDENCE UNDER GENERAL ISSUE that he "had never ousted the plaintiff of his portion of the demanded premises, nor in any way hindered his taking possession, but had only been in possession of the same as tenant in common with the demandant." *Billings v. Gibbs*, 587.
4. ASSUMPSIT CANNOT BE MAINTAINED BY ONE TENANT IN COMMON AGAINST HIS CO-TENANTS to recover for services rendered by him in selling the common property, and for money expended by him in advertising the property. *Hamilton v. Conine*, 724.
5. IN MARYLAND, TENANT IN COMMON MAY MAINTAIN ACTION OF ACCOUNT against his co-tenant in cases to which it is applicable; but this form of action is seldom used, a bill in equity being in most cases the more convenient and effectual remedy. *Id.*
6. TENANTS IN COMMON ARE SIMILAR TO PARTNERS in reference to the right to sue each other and the mode of doing so. The rules of law governing actions between the latter apply with equal force to actions between the former. *Id.*

See PARTITION; PARTY-WALLS, 2.

COVENANTS.

1. CONDITION IMPOSED BY GRANTOR AS TO USE OF PORTION OF LAND GRANTED DOES NOT OPERATE AS PERPETUAL RESTRICTION in favor of subsequent grantees of a part thereof, so that equity will restrain the violation of the condition, as against other grantees, in the absence of any fact or circumstance to show that the condition was annexed for the purpose of improving or rendering more beneficial the occupation of the estate granted, when it should be divided into separate parcels and be owned by different individuals, or with the object of benefiting another tract adjoining to or in the vicinity of the land. *Jewell v. Lee*, 744.
2. TO RECOVER FOR BREACH OF COVENANT TO REPAIR, demand to repair must be proved. *Cooke v. England*, 618.
3. COVENANT IN LEASE TO KEEP MILL IN NECESSARY REPAIRS does not bind covenantor to add improvements or make additions under his covenant to repair; but he is bound to renew existing machinery when too old and worn to answer its purpose in the mill. *Id.*
4. WITNESS WHO TESTIFIES TO IMPAIRED CONDITION OF BOLTING-CLOTHS AT ONE POINT OF TIME during the lease of a grist-mill, on the trial of an action for the breach of a covenant to repair, cannot be asked as to the effect of the impaired condition of the cloths upon the value of the flour manufactured in the mill during the lease, as he can speak only of the value of the flour manufactured at the time he examined the cloths. *Id.*
5. DECLARATIONS OF DEFENDANT CONCERNING HIS REFUSAL TO REPAIR or plaintiff's demand to repair is admissible after such demand is proved in an action for a breach of a covenant to repair. *Id.*
6. OFFER BY ANOTHER TO RELIEVE PLAINTIFF FROM SIX MONTHS OF LEASE at the same rent, with other favorable terms, is not relevant in mitigation of damages in an action against the lessor for a breach of a covenant to repair. *Id.*
7. CARELESSNESS OR UNSKILLFULNESS OF LESSEE OF FLOUR-MILL PRODUCING NECESSITY FOR REPAIRS may go to mitigate damages in an action on the covenant of the lessor to repair; but this cannot be fairly inferred from the opinion of an expert as to how long the bolting-cloths might last with proper care, and such testimony is properly excluded. *Id.*

8. EVIDENCE IN ACTION FOR BREACH OF COVENANT IN LEASE TO REPAIR grist-mill should be admitted on the part of the defendant to show the condition of the elevators in the mill when the plaintiff went into possession, either to show, in connection with other proof, that no repairs were necessary, or to what extent they were required, and to govern in damages. *Id.*
9. LEASE BY GUARDIAN. — ACTION OF COVENANT ON WORDS "DEMISED AND LEASED," brought by tenant under a lease by a guardian, who had afterwards been evicted by a subsequently appointed guardian, will not lie against the first guardian. These are not express covenants, and the lease being void, the implied covenants at least must fall to the ground. *Webster v. Conley*, 234.
10. IMPLIED COVENANTS NOT BINDING UPON OFFICERS. — Where officers or persons in representative capacity, in executing deeds or leases, use words from which implied covenants would arise against individuals, they are not bound by such, but are only concluded by express covenants. *Id.*

See PARTY-WALLS, 1.

CRIMINAL LAW.

1. PROSECUTOR CANNOT BE COMPELLED TO ELECT ON WHICH OF SEVERAL COUNTS OF INDICTMENT he will proceed, when they do not charge distinct offenses, but are introduced solely for the purpose of meeting the evidence as it may transpire, the charges being substantially for the same offense. *State v. Bell*, 658.
2. MOTION TO COMPEL PROSECUTOR TO ELECT ON WHICH OF SEVERAL COUNTS OF INDICTMENT he will proceed may be made at any time during the trial. *Id.*
3. ERROR IN DECIDING MOTION TO COMPEL PROSECUTOR TO ELECT on which of several counts of an indictment he will proceed cannot be reviewed or corrected by the appellate court, as such motions are addressed to the discretion of the lower court. *Id.*
4. PERSON IS GUILTY OF LARCENY WHO, WITHOUT ANY PRESENT INTENTION OF THEFT, obtains possession of another's team by falsely and fraudulently pretending that he wanted to drive it to a certain place, to be gone a specified time, when in fact he intended to go to a more distant place, and to be absent a longer time, and who, while thus in possession, without the consent of the owner, converts the team to his own use with a felonious intent. *State v. Coombe*, 610.
5. IN GEORGIA, INDICTMENT SHOULD CHARGE DEFENDANT "IN THE NAME AND BEHALF OF THE CITIZENS OF GEORGIA"; but an exception on the ground of failure to so charge must be taken before trial, and if not so taken, will not be good in arrest of judgment. *Horne v. State*, 49.
6. DEFENDANTS, UPON APPLICATION, HAVE RIGHT TO BE TRIED SEPARATELY in all cases where they are indicted for an offense which does not require the joint act of two or more to constitute the offense; the rule is otherwise in those cases which require the concurrence of two or more in the commission of the offense. In cases of the latter class, the matter rests in the legal discretion of the court before whom the trial takes place. *Id.*
7. JUDGE SHOULD DISCHARGE HIS DUTY WITH IMPARTIALITY, and it is error for him to remark, on a trial for murder, in ruling upon a question, that the deceased "had a right to be mad; he thought anybody shot had a

- right to be mad." The deceased had no right to be mad unless he had been wronged, and whether or not the defendants had wronged him, and if they had done so, to what extent, was the issue on trial by the jury, as to which they should receive no intimation from the judge of what he thought the verdict should be. *Id.*
8. ACCIDENTAL KILLING, WHEN EXCUSABLE. — If one in doing a lawful act, without any intention of bodily harm, and using proper precautions to prevent danger, unfortunately happens to kill another, the law excuses the killing. Accidental killing wholly to be excused from all guilt must be caused in the doing of some lawful act. *State v. Benham*, 416.
9. ACCIDENTAL KILLING NOT EXCUSABLE. — If defendant points a loaded gun at deceased under circumstances which would not have justified him in shooting him, and deceased seized the gun and struggled for it to save himself from the threatened injury, and in the struggle it went off without being purposely shot off by the defendant, the latter could not claim that the homicide was excusable: it would be manslaughter. *Id.*
10. SELF-DEFENSE. — On the trial of an indictment for murder, where it appeared that the defendant was a boy about sixteen years old; that the deceased was a strong, vigorous man, weighing about 170 pounds; that the latter threatened to whip the boy, and advanced upon him for the purpose with an ox-goad in his hand, — it is important that the jury should consider the relative strength of defendant and deceased, the size and character of the ox-goad, and the manner in which deceased threatened to use it, and the manner in which he entered upon the execution of that threat; and the court should call their attention thereto by proper instructions. *Id.*
11. SELF-DEFENSE JUSTIFYING HOMICIDE. — If deceased intended to take the life of defendant, or to do him some enormous bodily harm, it would be lawful for him to kill his assailant if he could by no other means prevent the assault. But if deceased intended only a simple non-felonious assault, such as chastising or whipping the defendant, and defendant killed him to prevent such assault, it would be at least manslaughter. *Id.*
12. WHERE DEFENDANT SOUGHT DECEASED WITH VIEW TO PROVOKE DIFFICULTY OR BRING ON QUARREL, and afterwards kills deceased, he cannot plead self-defense. *Id.*
13. SELF-DEFENSE — GREAT BODILY INJURY. — Defendant is justified in taking his assailant's life to save himself from imminent and enormous bodily injury, felonious in its character; and an instruction, that to justify killing another the defendant must show that it was reasonably necessary to save his own life, is erroneous in failing to so state. *Id.*

CURTESY.

ESTATE BY CURTESY OF HUSBAND IN WIFE'S REALTY, though modified by the Illinois married woman's act of 1861, is not, by that act, entirely destroyed. *Freeman v Hartman*, 193.

CUSTOM.

GENERALITY OF CUSTOM WHICH IS UNREASONABLE or dangerous, and productive of injury, cannot in any degree excuse an act done in conformity to it. *Hill v. Portland etc. R. R. Co.*, 601.

DAMAGES.

1. ALL DAMAGES ARISING UP TO DATE OF VERDICT MAY BE RECOVERED, where the act complained of or the breach assigned is one and complete in itself, and the damages flow naturally and necessarily from it; but the principle would not apply to nuisances and continued trespasses upon land. *Cook v. England*, 618.
2. ALL DAMAGES ARISING FROM BREACH OF COVENANT IN LEASE TO REPAIR, subsequent as well as prior to the institution of the suit, may be recovered in a suit brought during the term. *Id.*
3. MERELY SPECULATIVE INJURIES, DEPENDING ON REMOTE, UNCERTAIN, OR CONTINGENT EVENTS, afford no ground for damages; but certainty, as far as the nature of the case will admit, is to be aimed at. *Id.*
4. INSTRUCTION AS TO DAMAGES IN ACTION FOR NEGLIGENTLY CAUSING DEATH is erroneous where it permits the jury to go beyond the evidence in fixing the amount thereof, and to allow themselves to be influenced by their own experience with mankind. *Chicago etc. R. R. Co. v. Swett*, 206.
5. INSTRUCTION AS TO DAMAGES IN ACTION FOR NEGLIGENTLY CAUSING DEATH is too general and indefinite where it places no limit to the extent to which the jury may go in allowing for prospective as well as present injuries. *Id.*
6. NOMINAL DAMAGES ONLY CAN BE RECOVERED FOR NEGLIGENTLY CAUSING DEATH, if the next of kin are collateral kindred of the deceased, and have not been receiving from him pecuniary assistance, and are not in a situation to require it; and this no matter how near such collateral relationship may be. *Id.*
7. DAMAGES MAY BE RECOVERED FOR PECUNIARY LOSS IN ACTION FOR NEGLIGENTLY CAUSING DEATH, where the next of kin have been dependent on the deceased, in whole or in part, for their support, no matter how remote the relationship. In such case, the amount is largely left to the jury; but the jury must nevertheless base its verdict upon the evidence, and allow nothing by way of solatium. *Id.*
8. RULE AS TO ALLOWANCE OF EXEMPLARY DAMAGES APPLIES EQUALLY IN SUIT AGAINST CORPORATION as in a suit against a natural person. *Jeffersonville R. R. Co. v. Rogers*, 276.
9. IN ACTION OF TRESPASS AGAINST SEVERAL DEFENDANTS, JURY CANNOT ASSESS DAMAGES severally against them. *St. Louis etc. R. R. Co. v. South*, 103.
10. ERROR CAUSED BY INSTRUCTION THAT JURY MAY ASSESS DAMAGES SEVERALLY AGAINST SEVERAL DEFENDANTS IN TRESPASS IS CURED by the entry of a *nolle prosequi*, before judgment upon the verdict, against all the defendants but one, and taking judgment against him alone. *Id.*

See SLANDER.

DEATH.

See EVIDENCE, 19-25.

DEDICATION.

LAND MAY BE DEDICATED TO PUBLIC USE WITHOUT DEED OR OTHER WRITING, but the intent to dedicate should be clear, and the acts or circumstances relied on to establish such intention should be unequivocal and convincing. *Morrison v. Marquardt*, 440.

DEEDS.

1. LAND INCLUDED IN GUARDIAN'S DEED IS SUFFICIENTLY DESCRIBED where, prior to the proceedings to sell, it had been surveyed and platted into lots, numbered from 1 to 7, and a copy of the plat was made a part of the record in the case; and where one of the deeds describes, by metes and bounds, one and one quarter acres of one of these lots, and refers to the lot as "lot 1 in the survey of said land, being a part of the southeast quarter, section 5, township 78, range 24 west, 5 P. M."; and the other deed refers to the same survey by its date, and conveys all of said lot 1, after excepting, by metes and bounds, the parcel previously conveyed. *Pursley v. Hayes*, 350.
 2. GRANT OF LAND SO DESCRIBED IN CONVEYANCE AS TO RENDER ITS IDENTITY WHOLLY UNCERTAIN IS VOID. *Id.*
 3. GRANT OF LAND IS NOT VOID FOR UNCERTAINTY, if the court can imagine testimony which would show any particular monument to be that which is called for in the grant. A deed is not void for uncertainty of description if it can be made good by any construction. *Id.*
 4. TO SUPPORT DEED, IT IS NOT NECESSARY THAT CONSIDERATION SHOULD MOVE TO GRANTOR. If paid to another, it is just as effectual, and especially when thus paid at the instance of the grantor. *Id.*
 5. COURT OF EQUITY WILL REFORM MISEDSCRIPTION IN CONVEYANCE founded on a consideration, though the deed is a quitclaim, and contains no covenants. *Deford v. Mercer*, 460.
 6. OBJECTION THAT NAME OF COUNTY IS OMITTED IN CAPTION TO ACKNOWLEDGMENT OF DEED is obviated by proof that the justice of the peace who took the acknowledgment was a justice of the peace of the county where it was taken, and that he took it as such justice. *Graham v. Anderson*, 89.
 7. GRANTEES CLAIMING LAND UNDER PARTIES TO SUIT, or any of them, are in no better condition than those under whom they claim. *Schaferman v. O'Brien*, 708.
- See CONFLICT OF LAWS, 5; EJECTMENT, 2; FRAUDULENT CONVEYANCES; MARRIED WOMEN, 3, 4.

DOMICILE.

See CORPORATIONS, 1-3; MARRIED WOMEN, 7

DOWER.

- FORECLOSURE OF MORTGAGE IN WHICH WIFE DID NOT JOIN, AND SALE THEREUNDER, DOES NOT BAR HER RIGHT OF DOWER in the mortgaged premises, although she is made a party defendant in the foreclosure proceeding, but in which her right of dower is not put in issue. *Aliter*, if the wife had joined in the mortgage, or her right to dower had been put in issue by allegations in the petition. *Mooney v. Maas*, 395.
- See FRAUDULENT CONVEYANCES, 6; HOMESTEAD, 1.

EASEMENTS.

1. RIGHT TO TAKE FISH BELONGS, AT COMMON LAW, SO ESSENTIALLY TO RIGHT OF SOIL IN STREAMS or bodies of water where the tide does not ebb and flow, that if the riparian proprietor owns upon both sides of such stream, no one but himself may come upon the limits of his land

and take fish there; and the same rule applies so far as his land extends, to wit, to the thread of the stream, where he owns upon one side only. Within these limits, by the common law, his right of fishery is sole and exclusive, unless restricted by some local law or well-established usage of the state where the premises may be situate. *Beckman v. Krazner*, 146.

3. **RIGHT TO FISH IS PROPERTY, AND MAY BE GRANTED.** The right to take fish within the limits of one's own land bounding upon and including a stream not navigable, is so far a subject of distinct property or ownership that it may be granted, and will pass by a general grant of the land itself, unless expressly reserved; or it may be granted as a separate and distinct property from the freehold of the land; or the land may be granted, while the grantor reserves the fishery to himself. *Id.*
3. **ACTION OF TRESPASS LIES AGAINST A FOR ENTERING UPON B'S LAND AND FISHERY,** and taking fish from the waters thereof against the will and protest of the owner, and this independently of the question of ownership in the fish. *Id.*
4. **PARTY MAY ENFORCE RESTORATION OF BUILDING IN WHICH HE HAS EASEMENT,** and which was illegally destroyed under the pretense that it was a nuisance. He is not remitted in such case to his action for damages. *Morrison v. Marquardt*, 440.
5. **IMPLIED EASEMENT OF LIGHT AND AIR.** — English doctrine, that if one sells a house with windows and doors looking upon his own vacant ground, neither he nor his grantee can afterward build upon such vacant ground in such a manner as to seriously obstruct the flow of light and air to such house, is inapplicable to our situation and circumstances, and is not in force in Iowa. *Id.*
6. **DOCTRINE OF IMPLIED EASEMENTS RESTS UPON SUPPOSED INTENTION OF PARTIES,** as deduced from the situation and condition of the two estates, servient and dominant, to which the easement relates. *Id.*
7. **EASEMENT PREVENTING OWNER OF LAND FROM IMPROVING IT** as he pleases should not be implied where it is not clearly given. *Id.*

See PARTY-WALLS.

EJECTMENT.

1. **LESSORS OF PLAINTIFF IN EJECTMENT, CLAIMING BY COLLATERAL DESCENT,** MUST SHOW who was last legally seised of the land in controversy, and then prove his death without issue; and next prove all the different links in the chain of descent, which will show that the person so last seised and the claimants descended from some common ancestor, together with the extinction of all those lines of descent which could claim in preference to the lessors of the plaintiff. They must prove the marriages, births, and deaths, and the identity of persons necessary to fix title in themselves, to the exclusion of others who would have, if in existence, a better title to the land sought to be recovered. The first facts to be established by them, in the deduction of title, are, that the propositus died before the bringing of the action, and that he died without issue. *Sprigg v. Moale*, 698.
2. **PAROL EVIDENCE IS NOT ADMISSIBLE IN ACTION OF EJECTMENT TO IMPROVE CERTIFICATE** of acknowledgment to a deed, in the absence of fraud or imposition. *Graham v. Anderson*, 89.

EQUITY.

1. EQUITY WILL NOT LEND ITS AID TO SECURE BENEFIT OF DEFENSE AVAILABLE AT LAW, which the party neglected to interpose. *Gold v. Bailey*, 190.
2. EQUITY WILL NOT RESTRAIN COLLECTION OF JUDGMENT AGAINST ADMINISTRATOR AT SUIT OF HEIR, on the ground that a release of the claim on which the judgment was recovered had been executed to the deceased in his lifetime, no excuse being shown why such release was not interposed as a defense at law, and no fraud or collusion on the part of the administrator being alleged. *Id.*
3. MOTION TO DISMISS BILL IN EQUITY CANNOT BE HEARD AND DETERMINED IN VACATION, except by virtue of an order passed in term time authorizing the hearing in vacation. *Solomon v. Peters*, 69.
4. WHEN PROPRIETOR CONSTRUCTS WORKS useful for the public upon his private property, and the public enjoys the benefit of these works, equity requires that for the benefit received compensation must be returned, no matter under what name it is claimed. The use of the terms "tolls and charges" does not defeat the right of recovery. *Harvey and Wife v. Potter*, 532.

See DEEDS, 5; EXECUTORS AND ADMINISTRATORS, 3

ESTATES OF DECEDENTS.

1. PROPERTY SET APART TO WIDOW UNDER SECTION 2361 OF REVISION is not hers absolutely, to be disposed of by her for her own use or the support of her family. *Meyer v. Meyer*, 432.
2. NOTICE OF APPLICATION FOR ORDER TO SELL REAL ESTATE IS SUFFICIENT WHEN TO FOLLOWING EFFECT: "Notice is hereby given that I will apply at the December term of the county court" for order to sell the following described real estate of the estate of D., deceased, describing it, and concluding by notifying all persons interested to appear and show cause at that time why the order should not be granted, and being dated. That the word "next" did not appear before the words "December term" in the notice is immaterial, as there could be no doubt that the term meant was the next succeeding December one. *Finch v. Sink*, 246.
3. NOTICE OF HEARING OF PETITION TO SELL REAL ESTATE IS SUFFICIENT when a reasonable person in the exercise of his ordinary faculties, reading the notice, would be apprised by it in what court and at what term the petition would be presented. *Id.*
4. TIME. — NOTICE OF HEARING PETITION TO SELL REAL ESTATE IS SUFFICIENT AS TO TIME of hearing, when the term at which it is to be heard is given, without any day being specified. *Id.*
5. PRINTER'S AFFIDAVIT OF PUBLICATION OF NOTICE OF HEARING APPLICATION for sale of real estate cannot be attacked as to its sufficiency in a collateral proceeding. *Id.*

See EXECUTORS AND ADMINISTRATORS; WILLS.

ESTOPPEL.

See MALICIOUS PROSECUTION, 2, 3.

EVIDENCE.

1. EVIDENCE OMITTED BY OVERSIGHT OR MISTAKE MAY BE INTRODUCED WHEN. Where plaintiff, in an action on a contract against a married woman

which fails to disclose her coverture, inadvertently omits to introduce evidence constituting his reply to the plea of coverture, he may be permitted, in the court's discretion, to introduce it after the argument of one of defendant's counsel has closed. *McCormick and Brother v. Holbrook*, 400.

2. ADMISSIONS OF PARTY, WHEN INTRODUCED BY OPPOSITE PARTY AS EVIDENCE GENERALLY, are proper for all legitimate purposes. *Dickey v. Kellogg*, 154.
3. TESTIMONY COLLATERAL TO ISSUE IS PROPERLY EXCLUDED. *Shilling v. Carson*, 632.
4. TESTIMONY OF DECEASED WITNESS AT FORMER TRIAL IS NOT ADMISSIBLE unless the whole of it is proved. *Woods v. Keyes*, 766.
5. DECLARATIONS OF PERSON INJURED AS TO CAUSE OF HIS INJURY, made to his physician, are inadmissible in evidence. The physician cannot give in evidence the mere statement of the party injured in lieu of his own professional opinion. *Illinois Cent. R. R. Co. v. Sutton*, 81.
6. PHYSICIAN ASKED TO GIVE HIS OPINION AS TO CAUSE OF PATIENT'S CONDITION at a particular time must necessarily be guided to some extent in forming his opinion by what the sick person may have told him in detailing his pains and sufferings, and his opinion founded in part upon such data may be received in evidence; and he may even state what his patient said in describing his bodily condition, if it is said under such circumstances as free it from all suspicion of being spoken with reference to future litigation and give it the character of *res gestæ*. *Id.*
7. PARTY WHO HAS OFFERED TESTIMONY WHICH COURT HAS ADMITTED AGAINST OBJECTION by the opposite party, may, afterwards and before instructions are asked for, and before the cause has been argued by counsel, ask to have the same withdrawn from the consideration of the jury, and the court may allow its withdrawal. *Boone v. Purnell*, 713.
8. JURAT OF AFFIDAVIT OFFERED IN EVIDENCE MAY BE AMENDED by adding thereto a reference to the notarial seal of the notary before whom the affidavit was made, which reference was omitted in the original *jurat*; and the effect of such amendment is to make the affidavit relate back to and have full effect from its date. *Hallett v. Chicago etc. Ry Co.*, 393.
9. EITHER WRITTEN OR PAROL EVIDENCE MAY BE ADMITTED TO APPLY INSTRUMENT TO SUBJECT-MATTER. *Pursley v. Hayes*, 350.
10. FACT THAT ILLEGAL TESTIMONY HAS BEEN PERMITTED TO GO TO JURY without objection is not ground for allowing other testimony, inadmissible under the rules of evidence, to be given when objection thereto is made. *Higgins v. Carlton*, 666.
11. CONTENTS OF MEMORANDUM WHICH IS IN COURT CANNOT BE PROVED BY PAROL for any purpose. What is in writing must be proved by the writing itself. *Id.*
12. PARTY ASKING WITNESS QUESTION CANNOT OBJECT TO HIS ANSWER if it be responsive to the question. *Id.*
13. OPINION OF WITNESS AS TO "PHYSICAL CAPACITY" OF TESTATOR to hold conversations, testified to by another witness as having taken place at a time when the witness whose opinion is asked was not present, is not competent evidence. *Id.*
14. WHEN IT IS NECESSARY TO DETERMINE DATE OF PAPER offered in evidence, and the month is so inartificially written that upon inspection the presiding judge is unable to determine whether it should be read June or January, extraneous evidence is admissible to show the true

date, and the question is a proper one for the jury. *Fenderson v. Owen*, 551.

15. WHERE WHOLE EVIDENCE IS TRADITIONAL, CONSISTING ENTIRELY OF FAMILY REPUTATION or of statements of declarations made by persons who died long ago, it must be taken with such allowances and suspicions as ought reasonably to be attached to it. When family reputation, or declarations of kindred made in a family, are the subject of evidence, and the reputation is of long standing, or the declarations are of old date, the memory as to the source of the reputation, or as to the persons who made the declarations, can rarely be characterized by perfect accuracy. *Sprigg v. Moale*, 698.
16. IT IS DUTY OF COURT TO INSTRUCT JURY THAT THERE IS NO EVIDENCE legally sufficient to be considered by them, when, looking to the whole evidence adduced, and considering its quality and general tenor, and after deducing all reasonable inferences therefrom, it is satisfied that it is not legally sufficient to constitute the foundation for a verdict, and that a verdict founded upon it could not in justice and judicial propriety be allowed to stand. *Id.*
17. COURT TAKES JUDICIAL NOTICE OF WHO ARE JUSTICES OF PEACE of the county in which it is sitting. *Graham v. Anderson*, 89.
18. COURTS JUDICIALLY KNOW THAT MEMPHIS WAS IN FEDERAL MILITARY OCCUPATION in May, 1862, and within the confederate military lines in December, 1862. *Hyatt v. James*, 505.
19. COURT WILL NOT PRESUME, IN ABSENCE OF OTHER EVIDENCE, THAT PAYEE OF NOTE, which appears by its face to have been executed in Memphis, Tennessee, was a citizen of Louisville, Kentucky, at a period six months earlier, merely because at that time and place the mortgage which was given to secure the debt was executed. *Id.*
20. PRESUMPTION OF DEATH AFTER SEVEN YEARS' ABSENCE. — When a person goes abroad, and has not been heard of for a long time, the presumption of the continuation of life ceases at the expiration of seven years from the period when he was last heard of. And the same rule holds generally with respect to persons away from their usual places of resort, and of whom no account can be given. *Whiting v. Nicholl*, 248.
21. TIME OF DEATH, AT WHAT TIME DURING SEVEN YEARS. — Person once found to be alive is presumed to continue to live until there be proof to the contrary. At the end of seven years from the time he was last heard of, the presumption of life ceases, and the presumption of death takes its place. The legal presumption establishes not only the fact of death, but also the time of death. *Id.*
22. SHORTER PERIOD OF ABSENCE THAN SEVEN YEARS WILL NOT SUFFICE TO RAISE PRESUMPTION OF DEATH, but a party to whose interest it is to show that he was alive within that time is at liberty to do so by such facts and circumstances as will inspire that belief in the minds of the jury. The party who claims a benefit or interest in his being alive within the seven years must prove it. *Id.*
23. TIME OF DEATH OF PERSON WHO CANNOT BE FOUND is presumed to be seven years from the date upon which he was last heard from; but the person to whose interest it is to show that he died before that time may rebut this presumption by showing from facts and circumstances that his death in all probability happened before that day, or at any particular day between that time and the day he was last heard from. *Id.*

24. DEATH OF PERSON MAY BE PRESUMED TO HAVE HAPPENED BEFORE BRINGING OF SUIT, where it would be contrary to the ordinary course of nature that he should be living at that time, although there is no legal presumption of the period when death occurred, or up to which life endured. *Sprigg v. Moale*, 698.
25. IF IT BE ALLEGED THAT PERSON DIED, OR WAS DEAD, at any particular time within the period after which he will be presumed to be dead, the fact must be established by evidence. *Id.*
26. LAW MAKES NO PRESUMPTION AGAINST ISSUE, where the party is shown to have been married, and his wife to have been living at the time of the last intelligence of her. But the plaintiff must show either that he had no issue, or that issue is extinct. *Id.*
- See CONSTITUTIONAL LAW, 11; COVENANTS, 4, 8; EJECTMENT, 2; JURY AND JURORS; MARRIAGE AND DIVORCE, 1, 2; WITNESSES.

EXECUTIONS.

1. JUDGMENT IS NOT SUBJECT TO LEVY AND SALE UNDER EXECUTION. The proper practice is to garnish the judgment debtor. *Osborn v. Cloud*, 413.
2. LAW REQUIRING OFFICER LEVYING ON REAL ESTATE TO GIVE WRITTEN NOTICE OF LEVY to the tenant in possession is directory to the officer, and a failure to give such notice does not affect the title acquired by a *bona fide* purchaser under the levy. *Solomon v. Peters*, 69.
3. LEVY AFTER RETURN DAY OF EXECUTION, and after the writ has been actually returned into court after having been levied upon other property, and after the default of defendant who had been served by publication had been entered, is absolutely void, and an order of sale of property so levied upon is also void, and will be set aside on motion. *Osborn v. Cloud*, 413.
4. VOID EXECUTION SALE OF PROPERTY MAY BE SET ASIDE ON MOTION WITHOUT PROOF OF TENDER to the purchaser of the amount of his bid. *Id.*
5. PLAINTIFF IS NOT BOUND TO APPEAL FROM VOID ORDER DIRECTING SALE OF PROPERTY LEVIED UPON UNDER EXECUTION, but may obtain relief by motion to set aside the sale. *Id.*
6. PURCHASER AT SHERIFF'S SALE HAS ONLY TO SEE THAT OFFICER HAD COMPETENT AUTHORITY to sell, and did sell, and that the defendant in execution had title to the property sold. *Solomon v. Peters*, 69.
7. EXECUTION SALE MAY BE MADE AFTER RETURN DAY, OR AFTER WRIT HAS EXPIRED, where a valid execution was levied on real estate before the return day. A new execution is not necessary. *Moomey v. Maas*, 395.
8. PURCHASER OF REAL ESTATE AT EXECUTION SALE NEED NOT PLACE ANY EVIDENCE OF HIS SALE ON RECORD until twenty days after the expiration of the full time of redemption, as the publicity of the proceedings is constructive notice of the rights of the purchaser up to that time, but no longer under the statute. *Churchill v. Morse*, 422.
9. PURCHASER AT EXECUTION SALE OF MERE EQUITY OF JUDGMENT DEBTOR TAKES SUBJECT TO RIGHTS of persons holding prior equities, as where the equities are equal, the first in time is first in right. The rule relating to legal titles that the purchaser thereof takes, freed from the equities of third persons of which he had no notice, does not apply to such a case. *Id.*
10. EXEMPTIONS. — Thrashing machine used by a husband for thrashing his own grain, and that of other people for hire, is not exempt from execu-

tion under the statute exempting "the proper tools or implements of a farmer," and it goes to his administrator as assets to be administered. *Meyer v. Meyer*, 432.

See ATTACHMENTS, 3; JUDGMENTS.

EXECUTORS AND ADMINISTRATORS.

1. EXECUTOR OR ADMINISTRATOR MUST BE RECOGNIZED AS SOLE REPRESENTATIVE OF DECEASED, both as to debts and assets, so long as he retains his office; and a judgment against him, to be paid in due course of administration, will, in the absence of fraud, bind the personal estate. *Gold v. Bailey*, 190.
2. ADMINISTRATOR WHO HAS BEEN DELINQUENT IN DUTY IN NOT INTERPOSING AVAILABLE DEFENSE AT LAW IS LIABLE to the heirs on his bond; but persons holding claims against an estate will not be compelled to litigate them first with the administrator and then with the heirs, upon the same point or points which might have been investigated in the first case. *Id.*
3. COURT OF EQUITY MAY SET ASIDE JUDGMENT OF COURT OF ORDINARY granting letters of administration, where such judgment was procured by a party who fraudulently represented to the court that the deceased died intestate, when he knew that the deceased died leaving a will in another state. And the suit to set aside such letters of administration thus fraudulently procured may be maintained by the executor appointed by a probate court of the state where the testator died, upon his filing an exemplified copy of his appointment in court; and the defendant may be required to pay over to such foreign executor the value of the personal assets belonging to the estate of the decedent, to be duly administered according to the directions of the will and the law of the place of the testator's domicile at the time of his death. *Wallace v. Walker*, 70.

See EQUITY, 2.

EXEMPTIONS.

See ATTACHMENTS; EXECUTIONS, 10; HOMESTEADS.

FACTORS.

See AGENCY, 6, 7, 8.

FENCES.

1. WHERE ADJACENT OWNERS HAVE FIELDS INCLOSED IN COMMON, IT IS NO DEFENSE, in an action by one against the other, for willfully and designedly allowing his stock to run in the inclosure and upon plaintiff's crops, that the fence surrounding the inclosure was not a lawful fence. *Broadwell v. Wilcox*, 404.
2. NO AVERMENT OR PROOF AS TO LAWFUL DIVISION FENCE IS NECESSARY in order that plaintiff may recover of defendant, where they have lands inclosed in common, and the latter has willfully and designedly allowed his stock to run in the inclosure and upon plaintiff's crops. *Id.*

FISHERIES.

See EASEMENTS, 1-3.

FIXTURES.

1. **FIXTURES—HOUSE WHEN CAN BE REMOVED AS.**—Where a person mortgages a piece of ground, and afterwards forms a partnership with a third person, and they together build a carpenter-shop upon the land, without letting it into or attaching it to the ground, and in a manner which indicated an intention that it should not be permanent, and where the mortgage is afterwards foreclosed and the land sold, the building may be removed by the partners. *Kelly v. Austin*, 243.
2. **MORTGAGOR MAY MAKE TEMPORARY ERECTIONS UPON MORTGAGED PREMISES, AND REMOVE THEM** before the mortgage is foreclosed, if they are not attached to the freehold and do not depreciate the value of the security as it existed when the mortgage was given. The right of a third party who has made such an erection is much more absolute and extensive. *Id.*
3. **INTENTION WILL NOT ALWAYS DETERMINE WHETHER STRUCTURES BUILT UPON LAND ARE REAL OR PERSONAL PROPERTY**, but in cases of doubt it will have a controlling influence. *Id.*
4. **TRADE FIXTURES.**—Structures or improvements made to be used for the purposes of trade, or trade fixtures, may be removed by a lessee, when as between executor and heir, or vendor and vendee, the same things would be held to constitute part of the realty. *Id.*
5. **VENDEE IN POSSESSION OF LAND UNDER BOND FOR DEED, WITHOUT PAYING RENT, HAS NOT SAME RIGHT TO REMOVE FIXTURES** annexed by him, after a breach of the bond, as an ordinary tenant would have against his landlord; but his rights in this respect are no greater than those of a vendor or mortgagor against his vendee or mortgagee. *McLaughlin v. Nash*, 741.
6. **IN ASCERTAINING WHAT ARE FIXTURES, REGARD IS TO BE HAD TO THE** object, the effect, and the mode of annexation. *Id.*
7. **MACHINERY FOR TOOL-MAKING HELD TO BE FIXTURE**, when annexed by a vendee in possession to the freehold by being attached with bolts to a block set in the ground, and with screws and bolts to a building; while other machinery and tools, which were not fastened to the land, or which were capable of removal without displacing or materially injuring any part of the building or land, held never to have lost their character as chattels. *Id.*

FOREIGN LAWS.

UNWRITTEN LAW OF FOREIGN STATE IS TO BE PROVED by testimony of experts; the statutory law thereof is to be proved by the law itself, or by an exemplified copy. *Baltimore etc. R. R. Co. v. Glenn*, 688.

See **CONFLICT OF LAWS**.

FRAUDULENT CONVEYANCES.

1. **ASSIGNEE OF JUDGMENT ENTITLED TO COLLECT** from the judgment debtor his demand, existing as an original cause of action antecedent to a deed from such debtor to a third person, has the right to pursue any property belonging to the debtor, liable therefor, unless *bona fide* transferred to a purchaser for a valuable consideration. If the deed is an honest transaction, it will afford protection to the grantee therein against the claim which existed antecedent thereto, but upon which judgment was not rendered until afterwards; but if the deed be the result of fraudulent collusion between the grantor and the grantee to hinder and defeat the

creditors of the former, it cannot receive the countenance of a court of equity. *Schaferman v. O'Brien*, 708.

2. DEED HAVING ITS ORIGIN IN FRAUD IS NULLITY so far as the creditors of the grantor are concerned, however solemn it may be in its formalities. *Id.*
3. WHERE GRANTEE OF LAND MAKES CONVEYANCE THEREOF PENDING SUIT against him to set aside the deed to him as fraudulent, the persons to whom he conveys need not be made parties to the suit. *Id.*
4. INTENT AND PURPOSE TO DEFRAUD ARE NECESSARY TO CHARACTERIZE CONVEYANCE AS FRAUDULENT; and therefore the mere fact that a man who makes a conveyance owes money will not render it fraudulent, although indebtedness to a large amount in proportion to the value of the grantor's estate may authorize the conclusion that his intent and purpose were fraudulent. *Lowry v. Fisher*, 475.
5. CONVEYANCE TO HIS CHILDREN BY ONE WHO IS INDEBTED in a large amount in proportion to the value of his estate is constructively fraudulent as to subsequent as well as pre-existing creditors. *Id.*
6. UPON SETTING ASIDE OF HUSBAND'S CONVEYANCE AS FRAUDULENT and void, creditors are not entitled to a judgment for sale of the wife's dower in the land conveyed because she signed and acknowledged the deed with her husband. *Id.*
7. VOLUNTARY CONVEYANCE BY WOMAN, UPON EVE OF HER MARRIAGE, of property known by her intended husband to be hers, if made without his knowledge, is void as against him, because in derogation of his marital rights and just expectations. *Freeman v. Hartman*, 193.
8. INADEQUACY OF CONSIDERATION FOR CONVEYANCE IS NOT ALONE SUFFICIENT GROUND for setting it aside. *Id.*

See AUCTIONS, 3; HUSBAND AND WIFE, 2

GARNISHMENT.

See ATTACHMENT.

GIFTS.

1. DELIVERY OF PROMISSORY NOTE GIVEN CAUSA MORTIS WILL PASS the beneficial interest to the donee. *Ashbrook v. Ryan*, 481.
2. DELIVERY OF PASS-BOOK WILL NOT PASS MONEY IN BANK as a gift *causa mortis*. *Id.*

GUARDIAN AND WARD.

1. GUARDIAN MAY LEASE ESTATE OF WARD in the manner provided by statute; but where the statutory method is not observed, the lease is of no validity. Such a lease is governed by the common law; and guardians at common law except in chivalry could not lease the estate of their wards; and guardianship in chivalry is unknown to our law *Webster v. Conley*, 234.
2. FATHER HAS NO POWER BY VIRTUE OF BEING NATURAL GUARDIAN OF MINOR CHILD to sell or dispose of the latter's real estate, it not appearing that he was appointed guardian of the property of such child, or that he complied with the statutory requirements relating to guardian's sale. *Shanks v. Seamonds*, 465.
3. DEED MADE BY FATHER AS NATURAL GUARDIAN OF MINOR CHILD, PURSUANT TO SALE OF LATTER'S REAL ESTATE, without legal authority, AM. DEC. VOL. XCII—53

will not estop a third party from setting up a title to the land derived through a deed from the father himself, who became seized of the land by inheritance from the child, whose death occurred subsequent to the alleged guardian's sale; nor would such third party be so estopped by a failure to object before his purchase to improvements being made upon the land by the persons claiming title thereto through the alleged guardian's sale. *Id.*

4. CORRECTION OF MISTAKE IN DESCRIPTION OF LAND, PRESUMPTION AS TO. — Where it is shown that a mistake in the description of the lands in a guardian's petition for the sale of his wards' real estate was corrected after the petition was draughted, it will not be presumed, in the absence of evidence, that such correction was not made until after the petition was filed. *Deford v. Mercer*, 460.
5. HEIRS ARE ESTOPPED FROM QUESTIONING VALIDITY OF GUARDIAN'S SALE of their interest in certain lands on the ground of a defect in the proceedings, where, after becoming of age, with full knowledge of all the facts, and in the absence of fraud and mistake of fact, they receive and retain the purchase-money arising from such sale; and this principle applies even where the sale is void. *Id.*
6. INTERESTS OF INFANTS AND PURCHASERS ALIKE REQUIRE THAT GUARDIANS' SALES OF REAL ESTATE belonging to minors should not be held invalid for every departure from some directory provision of the statute, or for every error of decision in courts ordering these sales. *Pursley v. Hayes*, 350.
7. IOWA CODE OF 1851, SECTION 1721, CHAPTER 133, ONLY REQUIRED THAT MINORS SHOULD BE PERSONALLY SERVED in a guardian's proceeding to sell the real estate of his wards; and it was unnecessary that a copy of the petition and notice should be left with the minors unless demanded; so in a collateral proceeding to impeach the validity of a guardian's sale made several years before, where the application and notice, with the return of the officer indorsed thereon, were found attached, it was held to be fairly inferable that they were treated as constituting one paper, and so served and covered by the return of the officer. *Id.*
8. GUARDIAN'S BOND MADE PAYABLE TO COUNTY, INSTEAD OF TO PARTIES INTERESTED, IS NOT THEREBY VITIATED, under the Iowa statutes, but inures to the benefit of the latter; and suit may be brought thereon in the name of any one thus secured who has sustained any injury by a breach thereof. Nor will the fact that the bond is thus made payable, or the failure of the county judge to enter its approval of record, invalidate the title derived from the guardian's sale. Such defects are not jurisdictional. *Id.*
9. WANT OF SUFFICIENT CAPTION TO COUNTY COURT RECORD WILL NOT INVALIDATE TITLE derived through guardian's sale and deed. *Id.*
10. ONE GUARDIAN MAY BE APPOINTED FOR SEVERAL WARDS, JOINTLY, AND JOINT BOND MAY BE GIVEN for their security, where the wards hold by common title and as tenants in common. *Id.*
11. FAILURE OF GUARDIAN TO DO HIS DUTY IN KEEPING HIS ACCOUNT WITH SEVERAL WARDS separate and distinct will not invalidate a title under a sale made by him. *Id.*
12. DISCREPANCY BETWEEN PETITION FOR SALE OF WARDS' ESTATE AND NOTICE, EFFECT OF. — Where a guardian, in a proceeding to sell the real

estate of his wards, has notice directed to the wards, naming each of them, and it is thus served, while the petition only describes them as "the minor children of Hugh Pursley, deceased," this is not a jurisdictional defect that can be urged in a collateral proceeding to defeat the title of the purchaser at the guardian's sale, especially where it appears as a matter of fact that the heirs named in the notice are the only minor heirs, and the whole record shows that they were sufficiently named and described. In an original action, however, in the county court, a petition against the "minor heirs of Hugh Pursley, deceased," without more, and a notice in the same form, would doubtless be ineffectual to confer jurisdiction. *Id.*

13. RECORDS OF COUNTY COURT, THOUGH INFERIOR TRIBUNAL, NEED NOT RECITE IN DETAIL FACTS upon which the ultimate and essential conclusion as to jurisdiction was based, where a guardian's petition to sell the real estate of his wards alleged the requisite jurisdictional facts. *Id.*
14. EVIDENCE.—WHERE DEFENDANT INTRODUCES DEEDS MADE BY GUARDIAN WITHOUT ANY EVIDENCE SHOWING HIS AUTHORITY TO CONVEY, and the plaintiff afterwards offers to introduce all the records upon which the authority to sell was based, and the consideration of the points made on the record necessarily involves most if not all of those made against the introduction of the deeds, and the records are all embodied in the bill of exceptions, it becomes immaterial to consider whether the court did or did not err in admitting the deeds without preliminary proof, because if the records render defendant's title invalid, plaintiff's rights are equally protected as though the deeds had been rejected until such proof was made. *Id.*
15. IOWA CASES GROUPED AND CITED SHOWING RESPECTIVE RIGHTS AND OBLIGATIONS OF HEIRS AND PURCHASERS. *Id.*
16. SECTION 1508, CODE OF 1851, IOWA REVISION, SECTION 2560, WHICH PROVIDES THAT NO PERSON can question the validity of a guardian's sale of real estate after the lapse of five years from the time it was made, is not confined in its application to cases of appeal, writs of error, or other process bringing up the matter for review before an appellate court, but extends to proceedings questioning the validity of such sale other than by appeal, writ of error, etc. This statutory provision was not intended to cover sales made by a person having no semblance of authority, or where the county court had no jurisdiction of the parties or subject-matter, and no possession was taken by the purchaser. In such cases, the heir would not be estopped by the statute from questioning the validity of the sale, though after the expiration of five years. *Id.*
17. OBJECTIONS NOT JURISDICTIONAL IN THEIR CHARACTER, BUT RELATING RATHER TO REGULARITY OF PROCEEDINGS, cannot invalidate a title derived through a guardian's sale and deed when raised in a collateral proceeding, and especially when made for the first time after five years from the date of the sale, and where the purchaser took and held possession thereunder. *Id.*

HIGHWAYS.

OWNER OR CUSTODIAN OF SWINE IS LIABLE FOR INJURY OCCASIONED BY PERMITTING THEM TO RUN AT LARGE in the highway without a keeper, although he did not know they were in the highway at the time of the injury *Jewett v. Gage*, 615.

HOMESTEADS.

1. **HOMESTEAD AND DOWER CANNOT BOTH BE CLAIMED IN SAME PREMISES.** Widow who has had set apart to her in fee, as dower, a dwelling-house and part of the forty acres allowed by law as homestead, cannot have the remainder of said forty acres set apart to her as homestead. *Meyer v. Meyer*, 432.
2. **HOMESTEAD—TERMINATION OF RIGHT TO OCCUPY.**—Under statute giving wife right to occupy premises as homestead until "they are otherwise disposed of according to law," they are so disposed of when they are set apart to the widow in fee as dower upon her own application. *Id.*
3. **HOMESTEAD—RES JUDICATA.**—Where a widow not under any legal disability is sued in a matter involving her claim of homestead, and she fails to set it up or establish it, her homestead rights will be concluded by the decree therein, and she will not be allowed to afterwards assert it in another proceeding. *Wright v. Bunning*, 258.
4. **HOMESTEAD MAY BE ABANDONED BY WIDOW UNDER NO DISABILITY,** after the death of her husband, in the same manner as he could have done. *Id.*
5. **HOMESTEAD.**—Where person ceases to occupy premises as a home, or acquires another place of permanent abode, or where the place is abandoned with the intention to no longer occupy it as a home, the statutory homestead privileges are lost. But where the absence is occasioned by sickness or other necessary cause, is temporary, and with the intention to return, the case is different. *Id.*
6. **HOMESTEAD.**—Person cannot have two homes at once, both exempt, nor can he have two, either of which, at his election, would be exempt. *Id.*
7. **FORMER ADJUDICATION—HOMESTEAD.**—The heirs of a deceased husband commenced proceedings for partition, making his widow a party. She answered, claiming dower, which the court adjudged her, and as partition could not be made, the court decreed her an annual allowance in lieu of dower, and ordered the land sold subject to such payment. The widow made no claim of homestead, and it was held that she was estopped from doing so against the purchaser at the partition sale. *Id.*
8. **HOMESTEAD LAW PROTECTS POSSESSION HELD UNDER EQUITABLE AS WELL AS LEGAL TITLE;** hence, when a parol partition of lands between two tenants in common is had, and is followed by a several possession before a judgment lien attaches, each can claim the homestead right, even though the legal title to one half of his allotment be in the other cotenant, as each holds it after partition as trustee for the other. *Tomlin v. Hilyard*, 118.
9. **DEED CONTAINING NO RELINQUISHMENT OF HOMESTEAD RIGHT CONVEYS FEE TO HOMESTEAD PROPERTY,** but not the right of possession, and the grantee cannot prevail in ejectment against the grantor. *McDonald v. Crandall*, 112.
10. **HOMESTEAD RIGHT TO VALUE OF ONE THOUSAND DOLLARS IS NOT SUBJECT TO JUDGMENT LIEN, BUT MAY BE TRANSFERRED WITH FEE,** and the grantee will take it though a judgment against the grantor exists at the date of the conveyance. *Id.*
11. **SALE AND SURRENDER OF HOMESTEAD TO PURCHASER, WHO IS JUNIOR JUDGMENT CREDITOR,** will be sustained as against a title derived from a sheriff's sale under the prior judgment. *Id.*
12. **JUDGMENT OR MORTGAGE LIEN MAY BE ENFORCED AGAINST ANY EXCESS** in value of homestead over the amount allowed by the statute. *Id.*

13. ABANDONMENT OF HOMESTEAD IS EFFECTED AND RIGHT TO EXEMPTION IS LOST, when the grantor conveys the premises, and places the grantee in possession of the homestead. *Id.*
14. HOMESTEAD EXEMPTION STATUTE CREATES NO NEW ESTATE IN OWNER OF HOMESTEAD PROPERTY, but merely gives him the right to protect himself by the statute from his creditors so long as he or his family remain in possession. *Id.*
15. GRANTEE IN POSSESSION OF HOMESTEAD PROPERTY WILL HOLD IT AGAINST SUBSEQUENT PURCHASER, though the deed to the former does not, and the deed to the latter does, release the exemption. *Id.*
16. HOMESTEAD RIGHT CANNOT BE LOST BY ABANDONMENT, under the Massachusetts statute of 1855, until a new homestead is acquired elsewhere. *Woodbury v. Luddy*, 731.

HOMICIDE.

See CRIMINAL LAW, 5-13.

HUSBAND AND WIFE.

1. WRITTEN AGREEMENT BETWEEN HUSBAND AND WIFE, MADE PENDING HER APPLICATION FOR DIVORCE, that when the divorce should be granted she would pay him a certain sum for improvements made by him on her lands during marriage, is against public policy and void. *Muckebury v. Holler*, 345.
2. RECEIPT AND APPROPRIATION BY HUSBAND OF MONEY WHICH IS SEPARATE ESTATE OF HIS WIFE, with her knowledge and consent, does not establish between them the relation of debtor and creditor, unless at the time he received it he expressly agreed to repay it. And if, without agreeing to repay it, he invests it in his business, and afterwards executes a voluntary bill of sale to secure her, such conveyance will be fraudulent in law as against existing creditors, and void. *Kuhn v. Stangfield*, 681.

See CONFLICT OF LAWS, 1-4; CURTESY; DOWER; FRAUDULENT CONVEYANCES, 6; HOMESTEADS; MARRIED WOMEN.

INDICTMENTS.

See CRIMINAL LAW, 5-7.

INFANCY.

1. ON APPEAL IT WILL BE HELD THAT, UNLESS THERE WAS COMPLETE SERVICE UPON MINORS, the court below has no jurisdiction to appoint a guardian *ad litem*, or to make any order prejudicial to their rights. *Moomey v. Maas*, 395.
2. PURELY TECHNICAL DEFECT IN RETURN OF SERVICE OF NOTICE IN FORECLOSURE PROCEEDING UPON MINOR HEIRS OF DECEASED MORTGAGOR, does not make the foreclosure decree, and sale thereunder, void, though the return might have been pronounced defective on appeal; and such decree and sale cannot be invalidated on account of such defect, in a collateral proceeding instituted by such heirs to redeem the mortgaged premises, especially when several years have elapsed since the sale, and there are no supporting equities in the case. *Id.*

See CONSTITUTIONAL LAW, 3-5; GUARDIAN AND WARD.

INJUNCTIONS.

INJUNCTION — DAMAGES — CARE OF PROPERTY SUBJECT OF INJUNCTION. —

Injunction preventing defendant from digging, or in any way disturbing the surface of the ground, or from manufacturing any dirt already dug into brick, or from removing any brick already manufactured, does not prevent him from protecting from the rain a quantity of bricks molded, dried in the sun, and ready to be burned. It would be no violation of the injunction for him to take steps to protect the bricks, and for any loss which he suffers by reason of his neglect so to do plaintiff will not be liable on his bond. *Behrens v. McKensie*, 428.

See ATTORNEY AND CLIENT.

INSANITY.

1. **SIGNING BOND WHILE INSANE — NO DEFENSE, WHEN. —** That obligor was insane when he signed an injunction bond is no defense to an action against him thereon, where his insanity was not known to plaintiff at the time he signed the bond, and where it appeared that he was able to transact his own business. *Id.*
2. **LIABILITY OF INSANE PERSONS. —** Insane persons are generally held civilly liable for trespasses and torts, as the actionable quality of such acts does not depend upon intention. They are not usually held upon executory contracts not for necessities, especially where the insanity was known to the other party. But they are liable upon executed contracts in cases where the transaction is in the ordinary course of business, where the insanity was not known to the other party, and the parties cannot be put in *status quo*. *Id.*

INSURANCE.

1. **SPECIAL PLEA IS NECESSARY IN ACTIONS ON POLICIES OF INSURANCE** of all matters which show the transaction to be void or voidable on the ground of fraud, misrepresentation, or concealment. *Pino v. Merchants' Mutual Ins. Co.*, 529.
2. **CONTRACT OF INSURANCE IS COMPLETE** when the insured makes application for insurance, the application is accepted, the policy filled out in duplicate, and the applicant's name entered on the books of the company as being insured and if he is not required at that time to pay the premium, or notified of a stipulation in the policy requiring payment of the premium as a condition precedent to its binding force upon the company, the latter will be deemed to have waived such condition. *Id.*
3. **WAIVER BY PAROL MAY BE PROVED OF CONDITION IN POLICY OF INSURANCE** that "no insurance shall be considered as binding until the actual payment of the premium," the plaintiff may prove by parol a waiver of such condition by the company, as such proof does not alter or vary the written contract. *Id.*
4. **CONDITION IN POLICY OF INSURANCE** that "no insurance shall be considered as binding until the actual payment of the premium," is a condition which the insurers have a right to insist upon; but being a stipulation in their own interest, they may waive it if they choose. *Id.*

INTERVENTION.

See PLEADING AND PRACTICE, 1-4.

JUDGMENTS.

1. JUDGMENT AGAINST TWO DEFENDANTS JOINTLY IS ONE AND ENTIRE, and will be held invalid against both defendants if one was not an inhabitant of the state, and no legal service of the writ was made upon him. *Buffum v. Ramsdell*, 589.
2. IMPEACHMENT OF JUDGMENT BY ONE NOT PARTY THERETO. — Upon a bill to redeem a mortgage, brought by one claiming a right under a levy upon the mortgagor's equity of redemption, the respondent, not being a party or privy to the judgment, may avail himself of any illegality in it. *Id.*
3. JUDGMENTS AND PROCEEDINGS MAY BE ATTACKED COLLATERALLY WHERE THERE WAS NO JURISDICTION over the parties and subject-matter, because such proceedings are void; but proceedings merely voidable cannot be thus attacked. *Pursley v. Hayes*, 350.
4. ACTION MAY BE MAINTAINED UPON JUDGMENT IN SAME COURT IN WHICH IT WAS RENDERED while it is in full force and effect, although at the time of bringing his action plaintiff was entitled to an execution on the judgment. *Simpson v. Cochran*, 410.
5. RIGHT TO EXECUTION ON JUDGMENT IS MERELY CUMULATIVE, and does not prevent the judgment creditor from suing upon the judgment. *Id.*
6. MERGER. — It seems that a judgment in an action on a note, where the amount of recovery is left blank, does not merge the right of action on the note, although the amount of the judgment was referred to the clerk, who reported a sum which was accepted by the parties. *Id.*
7. COURTS WILL NOT PRESUME THAT OFFICER IN SERVICE OF PROCESS FAILED TO DISCHARGE HIS DUTY, or infer facts inconsistent with his return in order to divest rights acquired under it, or to defeat the judgment of a court of competent jurisdiction. *Pursley v. Hayes*, 350.
8. CODE OF IOWA, SECTION 2512, DECLARES THAT PROCEEDINGS OF ALL COURTS OF LIMITED AND INFERIOR JURISDICTION, like those of general and superior jurisdiction, shall be presumed regular, except in regard to matters required to be entered of record, and except when otherwise expressly declared. *Id.*
9. JUDGMENT IS LIEN ONLY ON INTEREST OF JUDGMENT DEBTOR. — If he has no interest, the judgment cannot operate as a lien; as where he has assigned his interest, of which fact the judgment creditor had no notice. *Churchill v. Morse*, 422.
10. NECESSITY OF LIEN BY JUDGMENT, OR OTHERWISE, AGAINST PROPERTY, as preliminary to equitable relief, is obviated since the act of 1835, chapter 380. *Schaferman v. O'Brien*, 708.
11. FORMER JUDGMENT. — As general rule, person having been made a party to a suit in a court having competent jurisdiction, and laboring under no disability, is bound by the determination of his rights, if fairly before the tribunal. When their rights are thus passed upon and determined, such parties are concluded from again litigating them in the same or another tribunal. *Wright v. Dunning*, 257.
12. OBJECT OF MAKING PERSON PARTY TO LEGAL PROCEEDING is to enable him to be heard in the assertion of his rights, and failing to set them up, that he may be concluded from again litigating them. *Id.*
13. ERRORS, IRREGULARITIES, AND MERE DEFECTS ARE ABSOLUTELY CONCLUSIVE IN COLLATERAL PROCEEDINGS, whether the court making them is one of limited and inferior or general and superior jurisdiction. *Pursley v. Hayes*, 350.

14. JUDGMENT OF COURT HAVING JURISDICTION OF PARTIES AND SUBJECT-MATTER IS CONCLUSIVE, in absence of fraud, and cannot be impeached collaterally. *Id.*

See EQUITY, 2; EXECUTIONS, 1, 9; EXECUTORS AND ADMINISTRATORS, 3; FRAUDULENT CONVEYANCES, 1; HOMESTEADS, 11, 12; STATUTE OF LIMITATIONS, 1.

JURISDICTION.

1. COUNTY COURT, IN IOWA, IS ONE OF LIMITED AND INFERIOR JURISDICTION; BUT, LIKE ONE OF GENERAL JURISDICTION, EVERY INTENDMENT WILL BE INDULGED IN favor of its acts, when acting within the scope of its power. Where its jurisdiction has once attached, the presumption obtains in favor of all the subsequent proceedings; and mere irregularities or defects will not avail in a collateral proceeding. If its power to decide is shown, it cannot be lost or taken away because erroneously exercised. *Pursley v. Hayes*, 350.
2. PROCEEDINGS FOR FORECLOSING MORTGAGES UNDER ARTICLE 64 OF MARYLAND CODE are not special and extraordinary proceedings of which the circuit court has no jurisdiction independent of the statute, but are within the general common-law and chancery powers of that court. The statute gives no new jurisdiction, but only prescribes a summary mode for the exercise of jurisdiction over the subject-matter of which the court had full and ample cognizance, independent of the provisions of the statute. Instead of a regular proceeding for foreclosure, the agreement of parties, as expressed in the power contained in the deed of mortgage, is substituted for a decree of sale, and upon report to and final ratification by the court, the sale has all the judicial sanction that it could have on more formal proceedings. *Cockey v. Cole*, 684.
3. WHERE SPECIAL AND EXTRAORDINARY POWERS ARE GIVEN BY STATUTE TO COURT in relation to a subject-matter of which such court has no jurisdiction independent of the statute, and the court derives its authority to act entirely from the statute giving the power and prescribing the mode of proceeding, all the requisites of the statute must be strictly complied with in order to render valid the exercise of the power given. *Id.*
4. COURT HAVING JURISDICTION HAS RIGHT TO DECIDE EVERY QUESTION arising in the cause, and its decision, whether correct or not, is, until reversed, regarded as binding in every other court. But judgments of a court which acts without authority are regarded as nullities. *Id.*
5. SALES RATIFIED BY COURT HAVING JURISDICTION SHOULD BE UPHOLD BY EVERY LEGAL INTENDMENT when they are collaterally attacked. If errors and irregularities exist, they are to be corrected by a direct proceeding, either before the same or an appellate court. *Id.*

JURY AND JURORS.

1. PEREMPTORY CHALLENGE — EXERCISE AFTER WAIVER. — Where when it came plaintiff's turn to exercise his right of peremptory challenge he answers that he has none to make, and the defendant then challenges a juror, and another is called to fill his place, plaintiff may then peremptorily challenge a juror who was on the panel at the time of his waiver; and his neglect to challenge only counts one upon the number of challenges allowed him. *Fountain v. West*, 405.

2. **INSPECTION OF PREMISES BY JURY.** — **STATUTORY REQUIREMENT THAT NO ONE SHALL SPEAK TO JURY ON SUBJECT OF TRIAL** should be carefully observed on the inspection by the jury of the property in dispute. And where, in violation of this requirement, a witness for the prevailing party was present and made a remark bearing on the case, which part of the jurors heard, and the verdict seemed to be founded upon a theory suggested by the remark, the judgment was reversed. *Erwin v. Bulla*, 341.
3. **IT IS EXCLUSIVE PROVINCE OF JURY TO WEIGH TESTIMONY** of witnesses, and give credence to those to whom it properly belongs, in cases where the evidence is conflicting, and the court will not interfere with their decision under such circumstances. *Illinois Cent. R. R. Co. v. Adams*, 85.
4. **CREDIBILITY OF WITNESSES AND WEIGHT OF EVIDENCE ARE QUESTIONS** for the determination of the jury. *Baker v. Young*, 149.
5. **WHERE VERDICT DEPENDS UPON CREDIBILITY OF WITNESSES**, it is the peculiar province of the jury to judge of that credibility, and to attach such weight to the testimony of each as may seem to be proper, after a due consideration of all the circumstances in the particular case. *Graham v. Young*, 89.

LANDLORD AND TENANT.

1. **TENANT'S RIGHTS OF POSSESSION OF DEMISED PREMISES ARE NOT IN ANY SENSE LOST OR IMPAIRED** by the entry of a person under direction of the landlord, for the purpose of making repairs or improvements, and he, the tenant, still has the right to go upon any part of such premises, though in the place (here a cellar) where the repairs are being made, and having such right, his clerk or servant has the same right, if made necessary by the duties of his employment. *Lamparter v. Wallbaum*, 225.
2. **PERSON MAKING REPAIRS UPON DEMISED PREMISES BY LANDLORD'S DIRECTION IS LIABLE** for injuries caused by his negligence to the servant of the tenant, where the latter has not materially contributed to the injury. *Id.*
3. **TENANT IS NOT RELIEVED FROM HIS EXPRESS CONTRACT TO PAY RENT** by the accidental destruction of the building leased, in the absence of a contract to rebuild, unless such relief is expressly stipulated in the lease. *Womack v. McQuarry*, 306.
4. **LEASE OF PART OF BUILDING AS CELLAR OR UPPER ROOM** forms an exception to the general rule of non-release from payment of rent upon the accidental destruction of the demised premises, for in such case there remains nothing upon which the demise can operate. *Id.*
5. **WHERE SAW-MILL AND ROOM IN ADJOINING FACTORY ARE LEASED TO SAME PERSON** by the same instrument for an entire rent, and both buildings are accidentally destroyed by fire, the lessee is still liable for the rent of the saw-mill, but is released from liability for the rent of the room, and the rent must be apportioned as in the case of a partial eviction of a tenant by title paramount. *Id.*

See COVENANTS, 3-8; EMBODITIONS, 2; FIXTURES, 4; USAGE.

LARCENY.

See CRIMINAL LAW, 4.

LETTERS.

See LITERARY PROPERTY.

LIBEL.

1. IN ACTION FOR LIBEL, DEFENDANT CANNOT PROVE THAT PLAINTIFF HAS BEEN GUILTY OF SPECIFIC ACTS OF DISHONESTY or particular offenses not connected with the transaction under investigation. *Fountain v. West*, 405.
2. LIBEL.—DEFENDANT, JUSTIFYING IN ACTION FOR LIBEL, WILL NOT BE PERMITTED TO PROVE TRUTH of matters contained in the alleged libel merely aggravatory of the main charge.
3. WHO HOLDS AFFIRMATIVE.—In action for libel, the plaintiff holds the affirmative, although defendant, in his answer, admits signing the alleged libelous publication, but denies all malice, amount of damage, and intentional publication. *Id.*
4. LIBEL.—NO JUSTIFICATION.—A publication which says that, "from circumstantial evidence," defendant "had good reason to believe, and did believe," plaintiff to be guilty of a certain crime, cannot be justified by proving that defendants did so believe, or had good reason to so believe. The plea of justification tendered an issue of fact; and it is incumbent on the defendant to prove that plaintiff was actually guilty of the offense. *Id.*
5. LIBEL.—Belief in the truth of a charge claimed to be libelous goes only in mitigation of damages, and is not a justification. *Id.*
6. TRUTH OF LIBEL MUST BE ESTABLISHED BEYOND REASONABLE DOUBT. Where defendant charges plaintiff with a crime, in an action of libel therefor, in order to justify in such action, defendant must produce such evidence of the truth of the charge as would convict the plaintiff if he were on trial therefor. *Id.*

LICENSE.

1. MERE LICENSE IS REVOCABLE, BUT WHEN CONNECTED WITH INTEREST OR GRANT, the licensor cannot revoke it so as to defeat the grant or interest to which it is incident. *Long v. Buchanan*, 653.
2. LICENSE TO ENTER PLAINTIFF'S PREMISES, COUPLED WITH INTEREST, SO AS TO BE IRREVOCABLE, results from an agreement by the terms of which plaintiff agreed to sell to the defendant her crop of corn, and to put it in her crib for him for measurement, from which he was authorized to take it; the corn to be settled for by a credit upon a mortgage, which he and another held against her, at a price larger than the then current prices in the market, and a receipt to be so given; and the corn was so placed in the crib, and the defendant invited to go for it, or notified to take it away at his pleasure; and for an entry under the agreement, the defendant is not guilty of trespass. *Id.*

LIENS.

See AGENT, 6, 7; JUDGMENTS.

LIGHTS.

See EASEMENTS, 4.

LITERARY PROPERTY.

1. AUTHOR OF LETTERS SENT TO OTHERS RETAINS ONLY QUALIFIED PROPERTY in their contents to the extent of having the sole right to publish

them; but that right entitles him to enjoin the publication of them by the recipient or any other person. *Grigsby v. Breckenridge*, 509.

3. **PROPERTY OF RECIPIENT OF PRIVATE LETTER, SENT WITHOUT RESERVATION** of any kind, is absolute, except in so far as it is qualified by the incidental right of the author to publish or prevent publication of it, and the recipient may keep the letter, or destroy it, or dispose of it in any other way than by publication. *Id.*
3. **PROPERTY OF RECIPIENT AND AUTHOR OF PRIVATE LETTER** is not joint. *Id.*
4. **PRIVATE LETTERS RECEIVED DURING HER GIRLHOOD AND FIRST MARRIAGE** from her first husband and others, as well as those received during her widowhood and second marriage from her second husband, are a woman's separate property, which she may, as between herself and her husband, keep or dispose of as she pleases, regardless of her husband's will. *Id.*

MALICIOUS PROSECUTION.

1. **BURDEN IS UPON PLAINTIFF** to show that former suit was without probable cause, where he sues the plaintiff therein for prosecuting a malicious suit. *Morton v. Young*, 565.
2. **ONE WHO SETTLES SUIT VOLUNTARILY IS ESTOPPED** from claiming that it was prosecuted without probable cause. *Id.*
3. **MONEY PAID UNDER PROTEST, TO PROCURE RELEASE FROM ARREST**, may be recovered on showing that the action in which the arrest was made was malicious and without probable cause. The payment in such case is not voluntary, and does not estop the defendant from proving that the suit was without probable cause. *Id.*

MANDAMUS.

2. **MANDAMUS WILL LIE AGAINST STATE TREASURER TO COMPEL HIM TO PAY INTEREST ON STATE BONDS TO TRUE OWNER**; and where the auditor of public accounts, through whom alone the treasurer can pay out money from the treasury, is made a party to the application, a peremptory *mandamus* will be granted requiring him to issue a warrant on the treasury for the amount of such interest. *People v. Smith and Miner*, 109.

MARRIAGE AND DIVORCE.

1. **EVIDENCE BY WITNESS OF REPUTATION OF MARRIAGE IS ADMISSIBLE** so long as it appears to be a general reputation; but as soon as it appears, on cross-examination or otherwise, that the witness is speaking from information given him by some individual, even of the existence of a general reputation, such evidence is merely hearsay, and as such is inadmissible. *Boone v. Purnell*, 713.
2. **GENERAL REPUTATION IN REGARD TO MARRIAGE MAY BE PROVED** by the testimony of a witness speaking from his own knowledge of the existence of such general reputation, except in cases of adultery or bigamy, in which strict proof is required. And such evidence is also admissible in disproof of marriage. It is admissible as a fact to show whether or not a marriage exists. *Id.*
3. **ALIMONY IS INCIDENT TO SUIT FOR DIVORCE**; and in adjusting alimony, all matters of property between the parties are to be considered, and the legal inference is, that they were considered and settled in the divorce suit. *Muckenburg v. Holler*, 345.

4. SUPREME COURT OF MAINE CANNOT GRANT DIVORCE to parties who were married in another state and never resided in Maine, but who, soon after the marriage, entered the state on a visit and spent four days there, living together as husband and wife; such visit is not a cohabitation within the act regulating divorces. *Calef v. Calef*, 549.
5. IT IS GOOD DEFENSE TO ACTION FOR BREACH OF MARRIAGE CONTRACT that the plaintiff fraudulently concealed from the defendant the fact that she had been delivered of a bastard child; and an answer setting up such defense is not demurrable. *Bell v. Eaton*, 329.

MARRIED WOMEN.

1. MARRIED WOMAN IS LIABLE ON HER CONTRACT, AS ONE RELATING TO HER SEPARATE PROPERTY, where she, being the owner of a farm and the personal property thereon, purchases upon a written order, not disclosing her coverture, a farming implement for the cultivation of her farm. *Aliter*, if she purchases the implement for a purpose foreign to her separate property. *McCormick and Brother v. Holbrook*, 400.
2. PETITION, IN ACTION ON CONTRACT AGAINST MARRIED WOMAN, NEED NOT STATE FACTS SHOWING THAT IT RELATES TO HER SEPARATE PROPERTY, where the contract sued on does not disclose the fact that defendant is a married woman. If coverture is pleaded as a defense, plaintiff may meet it by way of replication, and has only to show the facts in evidence constituting the reply, as this pleading is supplied by mere operation of the statute. *Id.*
3. INVALID DEED OF MARRIED WOMAN MAY BE MADE EFFECTUAL BY RE-DELIVERY AFTER DISCOVERTURE, where she has joined with her husband in the deed during coverture, but under circumstances rendering it invalid, as where it is defectively acknowledged, and has been delivered with this defect. *Pursley v. Hayes*, 350.
4. VALIDITY OF CONVEYANCE BY WIFE AFTER HUSBAND'S DEATH, WHERE CONSIDERATION HAD MOVED TO HIM. — Where a wife with her husband agrees to sell him her interest in certain real estate, and the husband at the time executes and acknowledges a deed for the premises, but does not deliver it, and his wife, not being present, fails to join therein, and the husband dies soon thereafter, and the widow shortly after his death duly executes and acknowledges the deed, which is then delivered to the purchaser, the payment of the consideration to the husband, with the knowledge and consent of the wife, and her voluntary execution and delivery of the deed after becoming discover, has the effect of divesting her of title. *Id.*
5. WHERE MARRIED WOMAN TOOK BY DEVISE UNDIVIDED INTEREST IN REAL ESTATE, and a bill was filed for the sale of the land for partition, which was answered by the husband disclaiming all interest in the property, and the decree of sale provided that the portion of the proceeds allotted to the wife should be deemed her separate estate, free from any claim or control of her husband or his creditors, and her portion of the proceeds was accordingly credited to her sole and separate use, and paid over to her attorney, this fund could not be attached for a debt of the husband. *Smith v. McAtee*, 641.
6. RECORD OF PARTITION SUIT IS ADMISSIBLE TO SHOW THAT FUND ATTACHED FOR HUSBAND'S DEBT was derived from a sale of the wife's realty, and that the conversion from realty into personalty was intended not to preju-

dice the rights of the wife. This forms an exception to the general rule, that judgments and decrees bind only parties and privies. *Id.*

7. FUND DERIVED FROM PARTITION SALE IN MARYLAND OF WIFE'S INTEREST IN REALTY, which is not attachable in that state for the husband's debt, cannot be so attached there on the ground that the domicile of the husband and wife is in Illinois, under the laws of which state the husband is entitled to all the personal property of the wife. *Id.*

See CONFLICT OF LAWS, 1-4; CURTESY; DOWER; FRAUDULENT CONVEYANCES, 6, 7; HOMESTEADS; HUSBAND AND WIFE.

MILITARY LAW.

1. ANY SOLDIER HAS RIGHT, IN TIME OF WAR, TO ARREST BELLIGERENT engaged in acts of hostility toward the government, and lodge him in the nearest military prison, and to use such force as may be necessary for that purpose, even unto death. This is the law of war. *Johnson v. Jones*, 159.
2. BELLIGERENT IS SUBJECT OF HOSTILE POWER, and his character in that regard depends upon that of the community to which he belongs. *Id.*
3. PEOPLE OF CONFEDERATE STATES WERE RECOGNIZED AS BELLIGERENTS during the Civil War, but citizens and residents of the Northern states, not engaged in war, were not belligerents, and subject to arrest by the federal authorities as prisoners of war, although they were domestic plotters against the government of the United States, in full sympathy with the confederates, and rendering them moral co-operation and aid. *Id.*
4. MILITARY LAW CONSISTS OF RULES PRESCRIBED BY CONGRESS for the government and discipline of troops, and applies only to persons in the military or naval service of the government. *Id.*
5. MARTIAL LAW IS NOT LAW IN ANY PROPER SENSE, but merely the will of the military commander, to be exercised by him only on his responsibility to his government or superior officer; and when once established, it applies alike to citizen and soldier. *Id.*
6. MARTIAL LAW MUST BE PERMITTED TO PREVAIL ON ACTUAL THEATER OF MILITARY OPERATIONS in time of war as an unavoidable necessity, resulting from the very nature of war. *Id.*
7. COMMANDING OFFICER MAY ARREST PERSON, whether citizen or alien, under authority of martial law, whom he finds within his lines giving aid or information to the enemy, and detain him so long as may be necessary for the security or success of his army. *Id.*
8. GOVERNMENT MAY BE JUSTIFIED IN TREATING DISTRICT AS VIRTUALLY ATTACHED TO THEATER OF MILITARY OPERATIONS, and in enforcing martial law therein, so far as may be necessary to the public safety, if in a district remote from the theater of military operations the popular sentiment is so disloyal to the government that one who aids and abets the public enemy cannot be rendered powerless for mischief and brought to justice by the arm of the civil law. *Id.*
9. EXERCISE OF MARTIAL LAW CAN BE DEFENDED UPON NO GROUND beyond its enforcement on the actual field of military operations, which is the result of an overmastering necessity, and its establishment in districts which, though remote from the seat of war, are yet so far in sympathy with the public enemy as to obstruct the administration of the laws through civil tribunals, and render a resort to military power a necessity, as the only means of restraining disloyalty from overt acts, and preserving the authority of the government. *Id.*

10. WAR DOES NOT OF ITSELF SUSPEND AT ONCE AND EVERYWHERE CONSTITUTIONAL GUARANTIES of liberty and property. *Id.*
11. MARTIAL LAW CANNOT BE RESORTED TO IN THAT PART OF COUNTRY where the civil courts, in the midst of loyal communities, are exercising their ordinary jurisdiction, although the government may be prosecuting a war for the suppression of a rebellion in other parts of the country; and if a person is arrested in such a loyal community, and deprived of his liberty by order of the President of the United States as commander-in-chief, and as incident to a state of war, without legal process, for alleged disloyal practices therein, such arrest will be unlawful, and the parties making it will be liable to an action therefor.
12. CONGRESS HAS NO POWER THROUGH RETROSPECTIVE LAW TO DENY AID REDRESS TO PERSON whose property or liberty was illegally taken under a military order. *Id.*
13. DEFENDANT IN ACTION FOR TRESPASS FOR ILLEGAL ARREST MAY PROVE IN MITIGATION OF VINDICTIVE OR EXEMPLARY DAMAGES, and for the purpose of rebutting the presumption of malice, that the arrest was made by virtue of an order of the President of the United States in time of war for alleged disloyal practices of the plaintiff, although a special plea setting up such order is not a bar to the action. *Breece, J., dissenting. Id.*
14. ORDER OF SUPERIOR OFFICER IS NO DEFENSE TO ACT OF SOLDIER, unless the act was one authorized by the laws of war, and which the superior officer had power to command. *Terrill v. Rankin*, 500.
15. LAWS OF WAR DO NOT JUSTIFY BREAKING INTO BANK AND SEIZING MONEY OF NON-COMBATANT CITIZENS, and an officer who does such an act, though in pursuance of the order of his commanding general, is personally liable for the consequences of his act. *Id.*
16. CONFEDERATE GOVERNMENT AND ITS OFFICERS ARE ESTOPPED FROM CALLING PEACEABLE CITIZENS of Kentucky enemies, or treating their property as that of enemies, by the fact that that government claimed political sovereignty over the state, provided a government for her, and gave her full representation in its Congress. *Id.*
17. FEDERAL ACT OF 1862, AUTHORIZING TAKING OF ALL SORTS OF PROPERTY in the revolting states, might have authorized a retaliatory enactment by the confederate government. But in the absence of such enactment, the officers of the confederate government were not authorized to order the taking by force of private property of non-combatant citizens, in violation of the laws of war. *Id.*
18. ORDER OF MILITARY COMMANDER DURING LATE CIVIL WAR requiring a bank to pay to him certain moneys was equivalent to a garnishment of such moneys. *Mandeville v. Bank of Louisiana*, 541.
19. PAYMENT MADE BY BANK OF MONEYS DUE ONE OF ITS DEPOSITORS, to a military commander, pursuant to his order, operates as a discharge of such bank, and such depositor cannot recover his deposit from the bank. The bank had no right to question the legality or propriety of the order, and no power to resist its enforcement. *Id.*

See WAR.

MASTER AND SERVANT.

1. BRAKEMAN MUST SEE THAT BRAKE IS IN REPAIR; COMPANY IS NOT LIABLE FOR HIS FAILURE TO DO SO. Where a brakeman was thrown from a railroad car and killed by reason of the brakehead coming off the upright

shaft, through the nut at the top being loose and coming off, the company will not be liable, as it was the brakeman's duty to see that the brake was in good repair and in fit condition for use, and to report its defects to the company. *Illinois Central R. R. Co. v. Jewell*, 240.

2. **FELLOW-SERVANTS — RAILROAD COMPANY, WHEN LIABLE TO ONE SERVANT FOR NEGLIGENCE OF ANOTHER.** — Where a railroad engineer is wild, reckless, and careless, and is going down grade at such an improper and excessive rate of speed as to necessitate the setting of the brakes, and where the setting of the brakes caused the train to oscillate violently, throwing the brakeman from the train and killing him, the railroad company is liable for damages for such killing, if the incompetence of the engineer was so generally known that they would be held to a knowledge of it. *Id.*
3. **RAILROAD COMPANY MUST FURNISH ITS SERVANTS SAFE MATERIALS AND STRUCTURES,** and keep its road and works and all portions of the track in such repair, and so watched and tended, as to secure the safety of all who may lawfully be upon them, whether passengers, servants, or others; and if the company fails in this respect, its employees not knowing of the defects, and not contracting with express reference to them, and being unable to ascertain them by the exercise of ordinary precaution or prudence, the company will be held liable for such injuries as their employees may suffer thereby. *Chicago and Northwestern R. R. Co. v. Swett*, 206.
4. **DUTY OF RAILROAD COMPANY TO FURNISH ITS SERVANTS SAFE MATERIALS AND STRUCTURES** cannot be avoided by the delegation of the power or authority to do so to any other or number of persons; for its undertaking with its servants in this regard is direct. *Id.*
5. **NEGLIGENCE OF FELLOW-SERVANT CANNOT BE SET UP AS DEFENSE** in an action against a railroad company to recover damages for the death of a servant employed on the road, occasioned by accident arising from the defective construction of the road. *Id.*
6. **EMPLOYEE OF RAILROAD COMPANY UPON TRAIN OF CARS IS NOT BOUND TO KNOW** whether the road and its culverts and bridges have been properly constructed, or not; he has a right to rely upon the implied undertaking of his employers that they have been properly constructed, and are safe for the passage of trains, and that his superiors will exercise all the necessary diligence to keep them in proper repair. *Id.*
7. **RULE THAT MASTER IS NOT LIABLE TO ONE SERVANT FOR INJURY CAUSED BY NEGLIGENCE OF FELLOW-SERVANT** applies to those cases only where the injury complained of happens without the fault of the master, either in the act which caused the injury or in the employment of the person who caused it. *Id.*
8. **MASTER IS LIABLE FOR INJURY TO SERVANT WHO IS HIRED TO PERFORM PARTICULAR SERVICE,** but who is compelled by a fellow-servant to labor at a business much more perilous, and is injured while so engaged. *Chicago etc. R'y Co. v. Harney*, 232.
9. **MASTER IS BOUND TO EMPLOY NONE BUT COMPETENT AND TRUSTWORTHY SERVANTS,** so far as reasonable care in their selection can accomplish that end; and if he fails in this, knowing the incompetency or carelessness of those whom he takes into his service, he must answer to his other servants for the consequences which may result to them. *Id.*
10. **FATHER CANNOT RECOVER FOR INJURIES RECEIVED BY MINOR SON** if at the time of the injury the son was in the defendant's service for hire, and

the injury was caused by his own negligence, or the negligence of a fellow-servant engaged in the same general employment, unless the defendant was negligent in hiring the co-servant by whose negligence the injury was caused. *Id.*

MAXIMS.

See NEGLIGENCE, 1, 2.

MISTAKE.

1. **MISTAKE OF FACT IN REDEEMING FROM TAX SALE** will be relieved against in equity the same as are other cases of mistake of fact. *Noble v. Bulle*, 442.
2. **RELIEF FROM MISTAKE OF FACT.** — Plaintiff's land had been sold for the taxes of a certain year. By mistake it was afterwards sold for the taxes of the same year. Upon discovering the fact of the first sale, and without knowledge of the second, plaintiff went to the clerk to redeem, and the clerk by mistake consulted the record of the second sale, and upon the plaintiff's paying him the amount due thereon, issued to him a certificate of redemption: *Held*, that these facts entitle plaintiff to redeem from the first sale after the period prescribed by law had expired, upon paying the holder of the tax deed the amount due him, with penalty and interest. *Id.*

MORTGAGES.

1. **MORTGAGE TO TWO OR MORE PERSONS TO SECURE DEBTS DUE THEM SEVERALLY CREATES ESTATE IN COMMON**, and the mortgagees are tenants in common, and not joint tenants. *Brown v. Bates*, 613.
2. **ASSIGNEE OF THREE OUT OF FOUR MORTGAGEES MAY, UNDER MORTGAGE MADE TO SECURE THEIR SEVERAL DEBTS, maintain a writ of entry for the possession of the mortgaged premises against the mortgagor, and all claiming under him, if the interest of the fourth mortgagee has not been legally assigned to the defendant, but remains vested in some third party, and the plaintiff in such case is entitled to an absolute judgment.** *Id.*
3. **REDEMPTION OF MORTGAGED PREMISES EFFECTED BY SUBAGENT, UNDER COLOR OF AUTHORITY, AND WHOSE ACTS are ratified by the principal, is good and binding upon the persons who purchased the same at foreclosure sale.** *Teucher v. Hiatt*, 440.

See ATTACHMENTS, 3; DOWER; FIXTURES, 1-3; INFANCY, 2; JURISDICTION, 2; TIME.

MUNICIPAL CORPORATION.

See CORPORATIONS.

MURDER.

See CRIMINAL LAW, 5-13.

NEGLIGENCE.

1. **MAXIM, SO USE YOUR OWN PROPERTY AS NOT TO INJURE THE RIGHTS OF ANOTHER**, applies to corporations as well as to individuals. *Hill v. Portland etc. R. R. Co.*, 601.
2. **EVERY MAN MUST SO USE HIS OWN PROPERTY AS NOT TO INJURE HIS NEIGHBOR; and if, through want of reasonable care or skill on the part of himself or his servants, he fails to do so, he must respond in damages.** *Schwartz v. Gilmore*, 227.

2. **OWNER OF PROPERTY IS NOT INSURER TO ALL THE WORLD** against injury from its use or condition; he is liable only for injury arising from a failure to exercise the same intelligence, prudence, and care in regard to his property for the security of others that prudent men would exercise toward their own. *Id.*
3. **OWNER OF PROPERTY UPON WHICH BUILDING IS BEING ERECTED** is not generally liable for injury resulting from the negligence of the contractor or his servants, where entire possession has been surrendered to the latter, and he proceeds with his work according to his own judgment, and is not subject to the control or interference of the owner. But if the injury was caused or contributed to by the fact that the plans for the building were essentially defective, the owner as well as the contractor would be liable. *Id.*
4. **OWNER OF PROPERTY HAS NOT SO FAR GIVEN ITS CONTROL TO CONTRACTOR** for building as to be relieved from liability for the contractor's negligence, where by the terms of the contract the builder is to carry forward the work under the control of a superintendent, and "to remove all improper work or materials upon being directed to do so by the superintendent," to whose judgment, both as to work and materials, he agrees to submit, and whose acts the owner agrees to recognize, and the owner also reserves the right to change his plan, and the architect is declared to be the superintendent for the owner. *Id.*
6. **OWNER OF BUILDING WILL NOT BE HELD LIABLE FOR DAMAGES** caused by falling of the walls of his building, though it appears that he was injured on Sunday, the day previous to the injury, that the walls were settling and leaning, and had said that he would attend to the matter, but really did not do so on that day, unless it also appears that the danger was so obvious that a reasonable and prudent man, the safety of whose person and property depended upon the walls, would have taken immediate measures on that day to have secured them. *Id.*
7. **ONE IS LIABLE FOR NATURAL AND PROBABLE CONSEQUENCES OF HIS NEGLIGENCE.** *McDonald v. Snelling*, 463.
8. **ONE WHOSE SERVANT NEGLIGENTLY DRIVES IN PUBLIC STREET AGAINST SLEIGH OF ANOTHER**, thereby causing the horse drawing the same to become frightened and run away, is responsible for injuries caused to a third person by such runaway horse. *Id.*
9. **ALLEGATION IN COMPLAINT THAT CHILD UNDER FIVE YEARS OF AGE WHO WAS INJURED BY PASSING LOCOMOTIVE** was by accident "playing near and on said track at a point near his home," is, unexplained, an admission of negligence on the part of those having the custody of his person; and to render the railroad company liable, its conduct must have been so negligent as to amount to a willingness to inflict injury; and in the absence of such an allegation, the complaint is demurrable. *Lafayette etc. R. R. Co. v. Huffman*, 318.
10. **THERE IS NO DISTINCTION BETWEEN CASE OF CHILD UNNECESSARILY EXPOSED** to danger and that of a person of mature years, where the question is one of simple negligence; but where the question becomes one of gross neglect or willful misconduct on the part of the defendant, the rule cannot be the same. *Id.*
11. **TO RENDER RAILROAD COMPANY LIABLE FOR RUNNING OVER CHILD WHO WAS PLAYING** on the track, the complaint must charge either knowledge of the fact that the child was so engaged, or such neglect in keeping a

- lookout as would have charged the company with negligence if a person of mature judgment had been upon the track. *Id.*
12. WORD "WANTON" DOES NOT MEAN WILLFUL, and in an allegation that defendant in a wanton and careless manner ran said locomotive, etc., the word "wanton" adds no force to the charge that the act was done in a careless manner. *Id.*
 13. TO DEFEAT ACTION FOR NEGLIGENCE, IT IS NOT NECESSARY THAT PLAINTIFF'S NEGLIGENCE should have brought the injury upon himself; if it directly contributed to that result, he cannot recover, where the defendant is chargeable only with want of ordinary prudence. *Id.*
 14. NEGLIGENCE. — IN ACTION FOR INJURY TO CHILD, COMPLAINT NEED NOT AVER that the child was not guilty of negligence; it is sufficient if it is averred that the injury was inflicted without the negligence of the parents, with whom the child resided. *Pittsburgh etc. R'y Co. v. Fanning's Adm'r*, 289.
 15. WHERE CHILD IS INJURED, IF NEGLIGENCE OF ITS PARENTS or those having custody of it contributes to such injury, unless the same is willful, no action will lie therefor. *Id.*
 16. INJURY TO CHILD. — Unnecessary exposure to known danger of a child incapable of exercising the care and judgment of mature years is in itself an act of negligence on the part of the parent sufficient to defeat a recovery, unless the injury be willful. *Id.*
 17. INJURY TO CHILD, WHO MAY SUE FOR. — Under the statute, an action for the death of a child must be brought by its father, or in case of his death or desertion of his family, by its mother, or by the guardian for his ward. Where there is no father, mother, or guardian, the administrator may bring the action. *Id.*
 18. WORD "CHILD" USED IN STATUTE is not equivalent to the word "minor," but is limited to such as occupy the position of child to a parent and are dependent upon the parent for support, etc. It does not include a minor who is the head of a family. *Id.*
 19. PLAINTIFF IN ACTION FOR INJURY TO PERSON CANNOT RECOVER, where his own negligence directly contributed to the injury. *Indianapolis etc. R. R. Co. v. Rutherford*, 336.
- See BAILMENTS; COMMON CARRIERS; DAMAGES, 4-7; MASTER AND SERVANT.

NEGOTIABLE INSTRUMENTS.

1. SIGNATURE OF PAYEE ON BACK OF NOTE DOES NOT AUTHORIZE PRESUMPTION, in absence of all proof, that he placed it there as a guarantor, nor justify the holder in writing a guaranty over the name. *Dietrich v. Mitchell*, 99.
2. PAYEE'S NAME ON BACK OF NOTE RAISES PRESUMPTION that he placed it there as assignor, with a view to assume the liabilities of an assignor. *Id.*
3. GUARANTY WRITTEN ABOVE INDORSER'S NAME ON ANOTHER'S WRITING RAISES NO PRESUMPTION that it was done by his authority, or that the contract was there when he wrote his name, where the plea denies the guaranty under oath. *Id.*
4. TO CHARGE INDORSING PAYEE AS GUARANTOR, PLAINTIFF MUST SHOW that he contracted as guarantor; and no inference to that effect can be drawn from his blank indorsement. *Id.*
5. STRANGER INDORSING NOTE AT TIME OF EXECUTION IS PRESUMED to indorse as guarantor. *Id.*

6. TIME OF PRESENTMENT MUST BE ALLEGED IN COMPLAINT ON BILL OF EXCHANGE; and an allegation that the bill was "duly presented for payment at the place where payable" is insufficient on demurrer. *Harbison v. Bank of the State of Indiana*, 308.
7. PROOF OF FRAUD IN INCEPTION OF BILL OF EXCHANGE casts upon the holder the burden of proving affirmatively that he took it *bona fide* for a valuable consideration. *Id.*
8. FORGED INDORSEMENT OF NEGOTIABLE BILL PASSES no title to it, even to an innocent indorsee, and no holder can recover the amount of it from the drawers without alleging and proving the payee's indorsement. *Follier v. Schroder*, 521.
9. ACTION CAN BE MAINTAINED ON NOTES and obligations only by those in whom the legal title is vested. *Id.*
10. PAYEE FOR VALUE OF BILL OF EXCHANGE duly protested for non-acceptance, with notice, cannot be affected by an agreement in regard to the bill between the drawers and a third person who has possession of it, without any transfer or indorsement from or under the payee. *Id.*
11. BILL MADE PAYABLE TO PARTY'S ORDER vests the title to it in him, and to divest him of it, a transfer from him or his indorsement is necessary. *Id.*
12. DELIVERY OF BILL OF EXCHANGE is essential to create a lien by way of collateral security or as a pawn. *Id.*
13. PERSON OTHER THAN REGULAR PARTY TO NOTE, WHO VOLUNTARILY PAYS IT for the honor or credit of an indorser, without request, does not thereby acquire a right to repayment from any prior party thereto. *Smith v. Sawyer*, 576.
14. RENEWAL OF PROMISSORY NOTE DOES NOT SATISFY DEBT, but merely operates to change the evidence of the debt, and will not destroy rights under it which the statute secures to creditors prior to a conveyance. *Lowry v. Fisher*, 475.
15. ACTION ON UNINDORSED NEGOTIABLE NOTE CAN BE MAINTAINED ONLY BY PAYEE or his personal representative. *Brown v. Nourse*, 583.

See GIFTS, 1; STATUTE OF LIMITATIONS, 2.

NOTICE.

See EVIDENCE, 16, 17.

NUISANCE.

PARTY MAY ABATE NUISANCE WITH HIS OWN HAND, but such abatement does not consist in the destruction of the property, unless such destruction be absolutely necessary. *Morrison v. Marquardt*, 440.

See EASEMENTS, 4.

OFFICE AND OFFICERS.

1. THAT POWER TO REMOVE is incident to the power to appoint does not apply to governors of states. Their power to remove is generally limited to particular cases provided for by statutory enactment. *Dubuc v. Voss*, 526.
2. GROUNDS UPON WHICH GOVERNOR MAKES REMOVALS should not needlessly be subject to the scrutiny of the courts, and liable for slight reasons to be annulled by judicial decree; but if there appears to be a reckless

violation of power, the judiciary may inquire whether the executive has infringed the law. *Id.*

2. **WHEREIN GOVERNOR ISSUES COMMISSIONS FOR SAME OFFICE**, on different dates, to different parties, and the one last issued recites that the party therein named is appointed in place of the person named in the first commission, who is removed, it is presumed that the commission last issued is the one legally in force. But this presumption in favor of the proper exercise of the power of removal is subject to be overthrown by countervailing evidence. *Id.*
4. **PRESUMPTION IS, THAT EVERY PUBLIC OFFICER** performs his duties properly. *Id.*

PARENT AND CHILD.

PERSON STANDING IN LOCO PARENTIS TO ANOTHER OCCUPIES SUCH RELATION as will require him to show that there was no fraud used or undue advantage taken by him in a transaction whereby his ward conveyed to him her interest in certain real property for less than one fourth of its real value. *Freeman v. Hartman*, 193.

See **FRAUDULENT CONVEYANCES**, 6.

PARTITION.

1. **PAROL PARTITION OF LANDS AMONG TENANTS IN COMMON**, when followed by a several possession in conformity with the terms of the partition, gives to each co-tenant the rights and incidents of an exclusive possession of his property. *Tomlin v. Hilyard*, 118.
2. **CONVEYANCE MAY BE COMPELLED BY CO-TENANT AFTER PAROL PARTITION**. Where two tenants in common have partitioned their land by parol, and each has taken possession of his allotment, one of the co-tenants may by a bill in chancery compel a conveyance of the legal title, according to the terms of the partition; because, while the legal title might not be considered as having passed, unless after a possession sufficiently long to justify the presumption of a deed, yet such parol partition followed by a several possession would leave each co-tenant seized of the legal title of one half of his allotment, and the equitable title to the other half. *Id.*
3. **IT IS ALWAYS INDISPENSABLE THAT SUBJECT OF EVERY COMPULSORY PARTITION** should be held in co-tenancy. Therefore, premises belonging in severalty to two, and no portion of them belonging jointly to both, are not subject to partition, either in equity or under the statute. *McConnell Kibbs*, 93.

See **CONFLICT OF LAWS**, 2; **HOMESTEADS**, 7, 8; **MARRIED WOMEN**, 5-7.

PARTNERSHIP.

1. **PARTNERS ARE ENTITLED TO SHARE IN PROFITS REALIZED FROM ADVENTURE** of one member of firm, in investing a large sum of confederate currency belonging to the firm, but supposed to be worthless, in the purchase and shipping of cotton. *Anderson v. Whitlock*, 489.
2. **GOOD-WILL OF FIRM IS CAPABLE OF VALUATION AND ASSIGNMENT** to the remaining partners, upon the outgoing of a partner, and will be recognized and protected by the law. *Angier v. Webber*, 748.
3. **GOOD-WILL OF FIRM IS BENEFIT OR ADVANTAGE ACCRUING TO IT**, in addition to the value of its property, derived from its reputation for prompt-

ness, fidelity, and integrity in its transactions, from its mode of doing business, and other incidental circumstances, in consequence of which it acquires general patronage from constant and habitual customers. *Id.*

4. **EQUITY WILL RESTRAIN VIOLATION OF COVENANT BY OUTGOING PARTNERS NOT TO IMPAIR OR INJURE GOOD-WILL** of business transferred by them to a remaining partner on the ground of the inadequacy of the legal remedies, and to prevent a multiplicity of suits. *Id.*
5. **PARTIAL RESTRICTION ON CARRYING ON TRADE OR BUSINESS IN PARTICULAR LOCALITY IS NOT OPEN TO ANY OBJECTION** on the ground of illegality, as violating the rules of sound public policy. *Id.*
6. **COVENANT NOT TO IMPAIR OR INJURE IN ANY MANNER GOOD-WILL OF BUSINESS IS NOT INVALID**, as being in undue restraint of trade, when made between the outgoing partners and the remaining partner of a firm, which carried on the business of wagoners between the city of Boston and the town of Somerville, occupying stands in certain streets in Boston with horses and wagons. *Id.*
7. **MERE FACT THAT PARTNERSHIP ONCE EXISTED DOES NOT, IT SEEMS, RENDER VOID JUDGMENT** obtained in the county court of Illinois by the administrator of one partner against the administrator of the other. If the defendant chose to submit to the jurisdiction, the power of the court to pronounce a judgment for the balance it might find due cannot be denied on the ground that that court has no jurisdiction in matters of partnership. *Gold v. Bailey*, 190.

See CO-TENANCY, 6.

PARTY-WALLS.

1. **COVENANT TO PAY OWNER OF ADJOINING LOT ONE HALF OF COST OF PARTY-WALL** erected by him when the covenantor should use the wall is a personal covenant, and does not pass to the grantee of the covenantor. *Block v. Isham*, 287.
2. **OWNERS OF ADJOINING PREMISES ARE NOT TENANTS IN COMMON OF PARTY-WALL**, but each owns in severalty the part thereof on his side of the line, with an easement of support from the other part. *Id.*

PAYMENT.

1. **PAYMENT OF INTEREST ON STATE BOND TO ONE NOT TRUE OWNER DOES NOT DISCHARGE STATE** if the latter has not authorized the payment. *People v. Smith and Miner*, 109.
2. **IF STATE CUSTODIAN OF MONEY PAYS INTEREST ON STATE BOND TO ONE SIMULATING TRUE OWNER**, it will be no bar to a recovery by the latter, because it is no payment. *Id.*
3. **STATE DISBURSING OFFICER MUST ASSURE HIMSELF OF IDENTITY OF PAYEE IN STATE BOND**; if through negligence in this respect payment of interest has been made to the wrong person, the state remains liable to pay the interest to the party entitled to it. *Id.*

PLEADING AND PRACTICE.

1. **INTERVENOR MAY JOIN EITHER PLAINTIFF OR DEFENDANT** in the principal action, or he may oppose both when his interest requires it; but he cannot, without the consent of plaintiff, be substituted in the place and stead of the defendant. *Clapp & Co. v. Phelps & Co.*, 545.

2. INTERVENOR STANDS IN CHARACTER OF PLAINTIFF before the court, as to the nature of his title and the object of his demand, and is governed in his pleadings by the rules of practice which apply to plaintiffs in principal demands. *Id.*
3. INTERVENOR CANNOT BOND PROPERTY in the custody of the sheriff under sequestration, as the right to bond property sequestered is given only to the parties to the action; first to defendant, and if he neglects to exercise the privilege within ten days after the seizure, then to the plaintiff. *Id.*
4. ORDER OF CLERK OF COURT authorizing intervenor to bond property in the custody of the sheriff under sequestration is void. *Id.*
5. FACT THAT DEFENDANT MIGHT BY CROSS-PETITION IN ANOTHER SUIT NOW PENDING OBTAIN SAME RELIEF HE NOW seeks in this action by motion, will not abate his proceedings herein. *Osborn v. Cloud*, 412.
6. DEFECT, IF ANY, OF DECLARING ON SEALED INSTRUMENT BY AVERRING SIMPLY that the defendant "covenanted" with the plaintiff, without saying "under seal," or using any technical word or phrase which in legal acceptance imports a seal, is one of form merely, and is waived by failing to demur, and pleading over; and it is not error to allow the contract to go to the jury. *Cooke v. England*, 618.
7. DEFENDANT MAY PLEAD GENERAL ISSUE TO ONE COUNT OF DECLARATION, although he demurs to other counts. *Patterson v. Wilkinson*, 568.
8. OBJECTION THAT PLEADING IS ARGUMENTATIVE WILL NOT BE CONSIDERED ON DEMURRER. *Bell v. Eaton*, 329.
9. DEMURRER IS ADMISSION OF ALL FACTS IN DECLARATION which are well pleaded. *Chicago etc. R. R. Co. v. Swett*, 206.
10. DEFENDANT IN ACTION FOR TRESPASS, WHO HAS PLEADED GENERAL ISSUE, MAY AT HIS OPTION CLAIM BENEFIT OF JUDGMENT on demurrer in favor of a co-defendant who has pleaded specially, if such special plea shows that the plaintiff cannot maintain his action against either, or he may insist on a trial of the issue made by his own plea. *Johnson v. Jones*, 159.
11. IF DEFENDANT IN ACTION FOR TRESPASS, WHO PLEADS GENERAL ISSUE, SEEKS TO AVAIL HIMSELF OF JUDGMENT ON DEMURRER TO SPECIAL PLEA OF CO-DEFENDANT, and the court permits it, the plaintiff can except, and preserve against them in the record the same question raised by his demurrer to the special plea; but if the defendant insists upon a trial of the issue made by his own plea, a verdict and judgment may be had according to the evidence. *Id.*
12. ACTION OF TRESPASS IS SEVERAL AS TO EACH DEFENDANT, and each has a right to make his own defense, and to have it tried, without being compelled to rely upon a defective defense made by a co-defendant. *Id.*
13. PLEA IN ABATEMENT IS NOT AMENDABLE after demurrer filed thereto. *Brown v. Nourse*, 583.
14. WHEN DEFENDANT IN HIS ANSWER neither denies the legal right of the plaintiff to recover, nor the truth of the allegations in his petition, they are taken to be confessed, and the plaintiff in such case need not adduce proof in support of his claim or demand. *Clapp & Co. v. Phelps & Co.*, 545.
15. PLEA OF GENERAL ISSUE ADMITS PLAINTIFF'S CAPACITY TO SUE, and the question of such capacity can be raised only by plea in abatement. *Brown v. Nourse*, 583.
16. IT IS NOT REQUIRED, UNDER MAINE PRACTICE, THAT WRIT SHOULD SET OUT WHERE or by what authority administration was granted.

17. PROOF OF FRAUD IS NOT ADMISSIBLE under a general denial. *Pino v. Merchants' Mut. Ins. Co.*, 529.
18. EVIDENCE IS ADMISSIBLE UNDER GENERAL DENIAL, in an action for an injury to the person, that the injury resulted from the plaintiff's negligence. *Indianapolis etc. R. R. Co. v. Rutherford*, 336.
19. SUBMISSION OF IMPROPER INTERROGATORIES TO JURY IS NOT AVAILABLE ERROR on appeal, when the party objecting could not have been injured thereby. *Id.*
20. OMISSION OF CLERK, IN HIS ATTESTATION OF WRIT, TO REFER TO SEAL OF COURT AFFIXED THERETO, MAY BE AMENDED in the particular complained of, so as to make the writ relate back to and have full effect from its date. *Hallett v. Chicago etc. R. R. Co.*, 393.
21. SERVICE BEFORE FILING. — Notice of the hearing of a proposed motion may be served before the papers upon which the motion is based have been filed in court. *Makepeace v. Luckens*, 263.
22. AMENDMENTS. — Authority to amend a record after the proceedings have ceased to be *in fieri*, and the term is past in which the record was made, is founded upon the acts of Parliament on the subject of amendments, which are declared by statute to be in force in this state. *Id.*
23. AMENDMENTS NUNC PRO TUNC are only allowed where the case is within a statute, or where there is something to amend by; that is, where there is some memorial paper, or other minute of the transactions in the case, from which what actually took place in the prior proceedings can be clearly ascertained and known. *Id.*
24. AMENDMENTS NUNC PRO TUNC HAVE ONLY BEEN ALLOWED where a subsequent paper, pleading, order, or proceeding in the progress of a case has been corrected by something in the record or proceedings of prior, or at least equal, date with the matter in which the error is sought to be amended. *Id.*
25. AMENDMENT INSERTING ORDER OF SALE IN RECORD NOT ALLOWED. — In proceeding by guardian to sell real estate of ward, the record showed a petition for the sale, the bond, appointment of appraisers, their report, the guardian's report of the sale, in which he reported that he made the sale in pursuance of a certain order of the court, and the confirmation of the sale by the court. Upon motion to enter *nunc pro tunc* a formal order of sale, *held*, that there being nothing preceding the order of sale which it is sought to have entered that implies that such an order was made, the amendment will not be allowed. *Id.*
26. AFFIDAVIT IN SUPPORT OF MOTION TO SET ASIDE DEFAULT, DISCLOSING MERITS, and showing that the defendant and his counsel had been in attendance upon the court until the judge announced that the case would not be tried at that term, and that upon the faith thereof they left the court, etc., shows good cause for setting aside the default, and is a basis for the disposition of the application by the judge in a summary way. *Ratliff v. Baldwin*, 330.
27. ACTION OF COURT IN GRANTING RELIEF ON MOTION TO SET ASIDE DEFAULT, WITHOUT TRIAL OF ANY ISSUE, is not erroneous, although the record disclosed that the affidavit was accompanied by a complaint to review the judgment, upon which an issue was made up, but the answer and reply were not in the record. *Id.*
28. INSTRUCTION WHICH HAS TENDENCY TO MISLEAD JURY SHOULD NOT BE GIVEN. *State v. Benham*, 416.

29. PRAYER FOR INSTRUCTION NOT BASED ON EVIDENCE IS PROPERLY REJECTED. *Cooke v. England*, 618.
30. INSTRUCTIONS TO JURY ARE NOT REQUIRED TO BE REPEATED by the court below, although stated in different language from those given, and containing correct legal propositions. *Hatty v. Markel*, 183.
31. COURT HAS RIGHT OF ITS OWN MOTION TO MODIFY PRAYER. It may reject all the prayers asked, and instruct the jury in its own words, or it may grant the prayers with such explanations or qualifications as may be necessary to a proper understanding of the case. *Higgins v. Carlton*, 686.
32. FACT THAT QUESTION OF LAW WAS SUBMITTED TO JURY IS NOT GROUND FOR REVERSAL, unless objection is made at the trial. And this objection must appear affirmatively upon the record, and is not to be left as a matter of inference. *Id.*
33. RULINGS OF COURT BELOW, THOUGH ERRONEOUS, ARE NOT GROUND FOR REVERSAL of a judgment, where it appears from the record that the appellant has not been injured by them. And for the purpose of determining whether or not he has been injured thereby, it is proper to look to the whole record, and not to that part only which precedes and includes the particular exception under consideration. *Id.*
34. VERDICT AGAINST EVIDENCE SHOULD BE INSTANTLY SET ASIDE. *Pursley v. Hayes*, 350.
35. PRESIDING JUDGE AT TRIAL IS NOT BOUND TO RULE ON QUESTION WHETHER PLAINTIFF'S EVIDENCE IS SUFFICIENT TO SUPPORT ACTION, unless the defendant will rest his case. *Manning v. Albee*, 736.
36. SUPREME COURT OF MASSACHUSETTS HAS NO MORE POWER ON BILL OF EXEMPTIONS TO REVISE IN MATTER OF FACT the finding of the judge to whom by the waiver of a trial by jury the case has been submitted in the court below than the verdict of a jury. *Harvard v. Day*, 790.

PLEDGE.

See AGENCY.

PRE-EMPTION.

See PUBLIC LANDS.

PRESUMPTIONS.

See EVIDENCE, 18-25.

PROCESS.

1. DISTINCTION BETWEEN EFFECT OF DEFECTIVE SERVICE AND OF NO SERVICE SHOULD BE OBSERVED. *Pursley v. Hayes*, 350.
2. NO STATUTE OF IOWA REQUIRES RETURN OF SERVICE TO BE ENTERED OF RECORD in proceedings by a guardian to sell the real estate of his wards, nor in such cases that the judgment must recite that due service was made; and there is no statute expressly excepting county courts in proceedings of this character from the operation of the general rule that the proceedings of all courts are to be presumed regular. *Id.*
3. COLLATERAL ATTACK FOR DEFECTIVE SERVICE. — In a guardian's proceeding to sell the real estate of his wards, where there was a notice and return of personal service on the minors, a defect in it, which the original tribunal before which the return was made held and treated as im-

material, cannot under the statutes and decisions of Iowa avail in a collateral proceeding to defeat the title of the purchaser acquired through the guardian's sale and deed, especially where the insufficiency of the return is attacked after a lapse of five years. *Id.*

PUBLIC LANDS.

1. **PRE-EMPTION RIGHTS AND BENEFITS MAY BE ACQUIRED BY COMPLIANCE WITH REQUIREMENTS OF PRE-EMPTION LAW**, and any other conditions or requirements superadded by the commissioners of the general land-office cannot affect one's rights under that law. *Baty v. Sale*, 123.
2. **PRE-EMPTION ACT DOES NOT REQUIRE APPLICATION FOR LANDS TO BE RENEWED**, where they have been withdrawn from market for a short period after a claim for a pre-emption has once been filed; and such a requirement imposed by the officers of the land-office amounts to nothing. They are powerless to annex conditions or provisions to the law; that can only be done by the law-making power. *Id.*
3. **PRE-EMPTOR HAS ONE ENTIRE YEAR, WHILE LAND IS SUBJECT TO ENTRY, WITHIN WHICH TO MAKE HIS FINAL PROOF** and to complete his purchase, under the act of September 4, 1841, sec. 15, 5 U. S. Statutes at Large, p. 457. *Id.*
4. **SAME—TIME, HOW COMPUTED, WHERE LANDS HAVE BEEN WITHDRAWN FROM MARKET FOR SHORT PERIOD.**—Where land is temporarily withdrawn from the market, after a party has filed his declaration of an intention to pre-empt it, the officers of the land-office may properly exclude the time that the land is not subject to entry, in computing the year within which he has the right to make his proof and enter the land. *Id.*
5. **SCHOOL LANDS.—ASSIGNMENT OF CONTRACT TO PURCHASE NEED NOT BE FILED.** Contract to sell school land as soon as the purchaser shall pay therefor may be assigned under the code. But the assignment does not have to be recorded in the office of the commissioner, nor would its being filed there operate as notice to third persons. Consequently a judgment against a holder of such a contract, who prior thereto had assigned the same, does not affect the title of the assignee, although the plaintiff had no notice of such assignment. *Churchill v. Morse*, 422.

PUBLIC POLICY.

See **CONTRACTS**, 5, 12; **HUSBAND AND WIFE**, 1.

QUARANTINE.

See **CONSTITUTIONAL LAW**.

QUESTIONS OF LAW AND FACTS.

WHETHER CERTAIN CHARACTERS WERE INTENDED to represent one word or another, is a question of fact to be determined by the jury. *Fenderson v. Owen*, 551.

RAILROADS.

1. **RAILROAD COMPANY HAS RIGHT TO ESTABLISH REASONABLE SIGNALS FOR STARTING TRAINS** from its stations; but it is the province of the jury to determine, upon the circumstances of the particular case, whether the loud and sudden sounding of a steam-whistle was a reasonable signal for such purpose, and within the rule of ordinary care. *Hill v. Portland &c. R. R. Co.*, 601.

2. IT IS COMPETENT FOR PLAINTIFF IN ACTION FOR PERSONAL INJURY, CAUSED by the fright of his horse at the sound of a locomotive whistle at a railroad crossing, to show that the sound of the whistle frightened other horses at the same time and place, and also to show the usual effect of that whistle on ordinary horses at the same place. *Id.*

See COMMON CARRIERS.

RECEIVERS.

1. LEGAL AUTHORITY OF RECEIVERS DULY APPOINTED IS CO-EXTENSIVE only with the jurisdiction of the court by whom they were appointed. *Hunt v. Columbian Ins. Co.*, 592.
2. STATE COMITY DOES NOT REQUIRE COURTS OF ONE STATE to permit receivers, appointed by the court of another state, to exercise privileges detrimental to the citizens of the former, while pursuing appropriate legal remedies there. *Id.*

REPLEVIN.

1. VENDOR MAY MAINTAIN REPLEVIN FOR GOODS WHICH HE HAS BEEN INDUCED BY FRAUD TO SELL, against a purchaser from the vendee who was a conspirator in the fraud, or who had notice of it, although the vendor transferred the vendee's note for the price for value, and never reclaimed it, the note not having been negotiated by the vendor with such knowledge or under such circumstances as to amount to an affirmation of the sale. *Manning v. Abbe*, 736.
2. DEFENDANT IN REPLEVIN CANNOT MAINTAIN SECOND ACTION OF REPLEVIN for the same property against the plaintiff in possession during the pendency of the first suit, nor can one deriving title from the defendant after the service of the writ maintain such action. *Hines v. Allen*, 574.
3. REPLEVIN. — OWNER OF GOODS carried by an express company may, after tendering the sum legally due for transportation, and demand and refusal, maintain replevin for the goods against the agent of the company who has them in custody. *Beech v. Blossom*, 555.
4. REPLEVIN LIES UNDER MAINE STATUTE for a wrongful detention as well as a wrongful taking, and either is sufficient to maintain the action. *Id.*
5. INSTRUCTION, "IF YOU BELIEVE FROM THE EVIDENCE THAT THE PROPERTY IN QUESTION WAS PLAINTIFF'S, you must find the defendant guilty," given to the jury in an action of replevin, is technically erroneous in not embracing proof of a demand; but where the record shows clear proof of demand before suit, and the evidence sustains the verdict, the appellate court will not reverse the judgment. *Jarrard v. Harper*, 84.
6. VERDICT IN REPLEVIN, "WE, THE JURY, FIND THE DEFENDANT GUILTY," is not precisely right; but the finding is equivalent to a finding of property in the plaintiff in a case where the proceedings were *ore tenus*. *Id.*

RESTRAINT OF TRADE.

See CORPORATIONS, 6-8.

SALES.

1. PROPERTY IN GRAIN SOLD, CONSTITUTING PART OF MASS IN ELEVATOR, PASSES TO VENDEE WITHOUT SEPARATION, and the vendee becomes a tenant in common with the vendor, where the vendor gives an order on

- the proprietors of the elevator to deliver the grain sold to the vendee, and the elevator proprietors accept the order, and agree thenceforward to hold that quantity for the vendee. *Cushing v. Breed*, 777.
2. WHERE PURCHASER OF WAREHOUSE AND GRAIN AGREES TO ASSUME ALL CONTRACTS OF VENDOR growing out of the business, an action will lie against him on a receipt previously given by the vendor for grain, stipulating that the grain should be delivered on demand or the money paid; but the vendor should be joined as a party defendant. *Hardy v. Blaser*, 347.
 3. PROPERTY IN TWENTY-EIGHT BARRELS OF FLOUR PASSES TO VENDEE AS BEING SUFFICIENTLY SELECTED AND SEPARATED, where the vendee purchased fifty barrels constituting part of a larger number at a railroad depot, received an order from the vendor upon the railroad company for a delivery thereof, and presented the same to the company, and obtained in return a "flour check," or order upon a clerk whose business it was to deliver such freight accordingly, under which twenty-two barrels were delivered to the vendee, but the remaining twenty-eight barrels were by mistake delivered to some unauthorized third person. *Hall v. Boston etc. R. R. Co.*, 783.
 4. PROPERTY IN GOODS SOLD VESTS IN PURCHASER, and they are at his risk from the time they are shipped, if the vendor ships within a reasonable time the amount and quality of goods ordered, in the manner directed. As soon as the goods are delivered to a carrier the title vests in the purchaser, subject only to stoppage *in transitu*. *Diversy v. Kellogg*, 154.
 5. LOSS FALLS ON PURCHASER OF GOODS, if after shipment of the amount and quality, in the manner directed, a portion is abstracted and others of an inferior quality substituted by third persons, so as to render the whole of an inferior quality. *Id.*
 6. PURCHASER WHO RECEIVES AND APPROPRIATES GOODS OF DIFFERENT KIND FROM THOSE ORDERED thereby makes them his own, and is liable to pay what they are reasonably worth. *Id.*
 7. PURCHASER IS NOT BOUND TO ACCEPT GOODS OF DIFFERENT QUALITY FROM THOSE ORDERED, but may, upon learning of their quality, within a reasonable time, give notice that he declines to receive them, and thereby avoid liability. *Id.*
 8. PROPERTY IN GOODS OF DIFFERENT QUALITY FROM THOSE ORDERED DOES NOT VEST IN PURCHASER until he accepts them with a knowledge of their quality, or after he has a reasonable opportunity of determining their quality; and the question of acceptance is one for the jury. *Id.*
 9. VENDOR'S FAILURE TO NOTIFY PURCHASER OF SHIPMENT OF GOODS ORDERED BY GENERAL AGENT will not release the purchaser from liability for the acts of the agent after the agency has ceased, or relieve him from giving notice of the termination of the agency, the goods having been ordered, shipped, and received by the agent, in the usual course of trade. *Id.*
 10. SALE ON CONDITION — TITLE. — A mare, being with foal, was sold on condition that she was to "remain the property of the vendor until paid for," — *held*, that the colt subsequently foaled continued the property of the vendor until performance of the condition. *Allen v. Delano*, 573.
 11. CONTRACT BY WHICH MARES ARE DELIVERED TO PERSON TO WORK AND USE, keeping them upon the place he was then occupying, the mares to become his property upon the payment of one hundred dollars balance of the purchase price, but to remain the property of the original owner

until such payment, is a valid contract, and is a conditional sale, not a mortgage. *Dunbar v. Rawles*, 311.

12. COURT OF EQUITY WILL NOT TREAT CONDITIONAL SALE as mortgage, except upon equitable grounds and to prevent fraud. *Id.*
13. COURT OF EQUITY WILL NOT TREAT CONDITIONAL SALE AS MORTGAGE at the instance of a purchaser from the vendee in the conditional sale, who within an hour after his purchase was fully informed by the vendee that he had no title, and was tendered back the price paid, but refused to receive it and restore the property. *Id.*
14. SALE AND DELIVERY OF GOODS UPON CONDITION THAT TITLE SHALL NOT PASS UNTIL PAYMENT OF PRICE vests in the vendee no title which he can convey to a purchaser in good faith and for a valuable consideration. Under such contract, the vendee takes no more than a mere right of possession. *Id.*
15. VENDOR IN CONDITIONAL SALE IS ENTITLED TO RECOVER IN REPLEVIN OR TROVER from any purchaser from his vendee the full value of the property, if a return cannot be had, though a less sum was due from the vendee on his contract, for the absolute title is in the vendor. *Id.*
16. WHETHER OR NOT PURCHASER FROM VENDEE IN CONDITIONAL SALE may avail himself of the rights of his vendor to acquire title, *quære*. *Id.*

See AUCTIONS.

SELF-DEFENSE.

See CRIMINAL LAW, 10-13.

SLANDER.

1. OFFICE OF INNUENDO IS TO EXPLAIN WORDS SPOKEN, and it cannot extend or enlarge their sense beyond their usual and natural import. *Peterson v. Wilkinson*, 568.
2. WHERE WORDS ARE ALLEGED TO BE SLANDEROUS BY REASON OF SOME EXTRINSIC FACT, such fact must be averred in a traversable form, with a proper colloquium. *Id.*
3. WORDS "MALVINA [PLAINTIFF] HAS BEEN TO SWEAR A YOUNG ONE" fairly convey the idea that she committed the offense of fornication, and are actionable. *Id.*
4. DIFFERENT ACTIONABLE WORDS, SPOKEN AT DIFFERENT TIMES, constitute several and distinct causes of action, and should be embodied in separate counts. *Id.*
5. IN ACTION FOR SLANDER, PLAINTIFF MUST PROVE LANGUAGE LAID IN DECLARATION, or so much, at least, as fully sustains the charge; equivalent words in meaning will not be sufficient. All the words need not be proved if those which are proved fully establish the slander; but if other words not laid are proved, which limit or change the meaning of those counted on, the action cannot be sustained. If all the words laid are necessary to constitute the slander, they must be proved as laid. *Baker v. Young*, 149.
6. VARIANCE DOES NOT EXIST BETWEEN WORDS LAID AND WORDS PROVED, in an action for slander, because more words were proved than laid where the injury complained of was charging the plaintiff, an unmarried woman, with fornication, and the additional words proved did not alter the charge, but only specified with whom the offense was committed, and that an effort had been made to produce an abortion. *Id.*

7. INSTRUCTION IS NOT ERRONEOUS, AS BEING CALCULATED TO MISLEAD JURY by implying that it did not matter how the words were connected, nor as assuming that a sufficient number of words had been proved, where, in an action for slander in charging the plaintiff with fornication, the jury were informed that if they believed a sufficient number of words laid in the declaration to amount, in their common acceptance, to a charge of fornication, had been proved to have been spoken by the defendant, they should find for the plaintiff. *Id.*
8. INSTRUCTION IS NOT ERRONEOUS, AS ASSUMING GUILT OF DEFENDANT, or the circumstances of the case, where, in an action for slander, the jury were informed that the law implied damages from the speaking of actionable words, and that the defendant intended the injury the slander was calculated to effect. *Id.*
9. ACTION FOR SLANDER COMMITTED BY WIFE ALONE DURING MARRIAGE MUST BE BROUGHT AGAINST HUSBAND AND WIFE JOINTLY; and if the jury finds that the wife spoke the slanderous words, a verdict must be found against both defendants. *Id.*
10. VERDICT IN ACTION AGAINST HUSBAND AND WIFE FOR SLANDER COMMITTED BY WIFE IS SUFFICIENT where it simply finds the defendants guilty and assesses the damages, instead of stating that it found the defendants guilty in manner and form as alleged in the declaration. *Id.*
11. AS PLAINTIFF IS PERMITTED TO PROVE MALICIOUS INTENT, IN ACTIONS OF SLANDER, in order to aggravate the damages, so the defendant, to repel it, may show grounds of suspicion of the truth of the charge, by facts and circumstances; not in bar of the action, but in mitigation of damages. *Shilling v. Carson*, 632.
12. PARTICULAR INSTANCES OF MISCONDUCT ARE NOT ADMISSIBLE TO DIMINISH DAMAGES in an action of slander, where general character is the subject of defamation, for the plaintiff is required to be prepared to maintain only his general reputation. *Id.*
13. GENERAL REPUTATION FOR WANT OF CHASTITY IS ADMISSIBLE IN MITIGATION OF DAMAGES in an action of slander, the subject-matter of which is the reputation of a woman for chastity; for she must be expected to be ready to vindicate her character in that particular in which it is impugned. *Id.*
14. ADMISSION OF EVIDENCE IN MITIGATION OF DAMAGES IN ACTION OF SLANDER, being either to show absence of malice or want of reputation, whatever circumstance tends to prove the one or the other is within the reason of the rule. *Id.*
15. PLAINTIFF'S MOTHER MAY BE ASKED, ON CROSS-EXAMINATION in action of slander for impugning plaintiff's chastity, whether or not before the defamation complained of the witness had spoken to others and complained to them, and had frequent misunderstandings with them on the same subject, as this is evidence, not of mere rumor or report, but of facts which go to show that the words were spoken under an impression of their truth, and not with any malicious intention, and the evidence is admissible under the general issue. *Id.*
16. NO INDUCEMENT SETTING FORTH PREVIOUS REPUTATION OF PLAINTIFF is necessary in an action of slander under the code. Every woman is presumed to be chaste and every man to be honest until the contrary is shown, and this being necessarily implied, the rules of evidence in mitigation of damages must be the same as if such inducement were averred. *Id.*

17. VERDICT IN ACTION FOR SLANDER WILL NOT BE SET ASIDE FOR EXCESSIVE DAMAGES unless the damages are palpably excessive, or there was manifest prejudice or other misconduct of the jury. *Baker v. Young*, 149.

SPECIFIC PERFORMANCE.

SPECIFIC PERFORMANCE OF CONTRACT TO EXCHANGE FARM FOR TENEMENT HOUSES WILL NOT BE DECREED in favor of the owner of the houses, who induced the defendant to enter into the contract by means of material misrepresentations of the amount of rent yielded by the houses; although such representations were not fraudulent, and the plaintiff offers to make good the deficiency in the rent, and although the contract was partially executed before the representations were discovered to be untrue. *Boynston v. Hamelboom*, 738.

STAMPS.

See CONTRACTS, 4.

STATUTE OF FRAUDS.

1. WRITING HAS NO EFFECT AS CONTRACT OR MEMORANDUM UNDER STATUTE OF FRAUDS until it is signed by the party to be charged. *Harvard v. Day*, 790.
2. TELEGRAMS SIGNED BY VENDEE OF REAL ESTATE ARE INSUFFICIENT TO CONSTITUTE MEMORANDUM UNDER STATUTE OF FRAUDS, where they do not describe, mention, or refer to the subject-matter of the contract otherwise than by showing the terms of part payment, and directing the agents of the vendor to draw up a contract accordingly. *Id.*
3. REQUIREMENT OF STATUTE OF FRAUDS OF WRITTEN MEMORIAL OF CONTRACT FOR SALE OF LAND is satisfied by a receipt for money "for land" shown to be the land in contest, strengthened by the admissions of the personal representatives of the party to be charged as to his liability and duty. *Miller v. Antle*, 495.
4. AGREEMENT BY VENDEE OF REAL PROPERTY THAT, AS PART OF CONSIDERATION of the conveyance, he will take up and pay a note which his vendor owes on the same property, is not a contract to "answer for the debt, default, or misdoing" of the vendor, so as to be void under the statute of frauds because it is not in writing; but is a new contract for a valid consideration which is valid by parol and binding upon the parties. *Jennings v. Orider*, 487.

STATUTE OF LIMITATIONS.

1. WHERE JUDGMENT IS CONFERRED BY FRAUDULENT GRANTOR, BEFORE CLAIM IS BARRED by the statute of limitations, the original cause of action is merged in the judgment, and the plea of the statute cannot avail against it. *Schaferman v. O'Brien*, 708.
2. MAINE STATUTE OF LIMITATIONS IS NO BAR TO ACTION IN THAT STATE UPON NOTE MADE IN ANOTHER STATE, where the defendant has not resided in Maine since the date of the note. *Brown v. Nowra*, 583.

See ADVERSE POSSESSION.

SUNDAY.

See CONTRACTS, 13, 15.

TIME.

COMPUTING TIME—REDEMPTION OF MORTGAGE.—Time is computed by excluding the first day and including the last day upon which a thing is to be done. So where mortgaged premises have been sold at foreclosure sale on a certain day, the redemptioner has until the last moment of the same day of the succeeding year in which to redeem. *Toucher v. Hiatt*, 440.

TRESPASS.

1. **PERSON HAS NO RIGHT TO GO INTO OR UPON PREMISES OF ANOTHER** after the owner has forbidden him to do so; nor has he a right after having entered by leave to stay upon being requested by the owner to depart; and this though such premises be a business office or mercantile house, workshop, factory, or other place of business. No doubt the very fact that a professional man or a merchant or other person opens an office to transact business with and for the public is a tacit invitation to all persons having business with him, and a permission to others, to enter unless forbidden; but this does not divest the owner of his control over it, or the right to prevent whom he pleases from entering, and to require any and all persons to depart after they have once entered. *Woodman v. Howell*, 221.
2. **PERSON WHO IS IN OFFICE OF ANOTHER BY LATTER'S COURTESY** cannot authorize others to use, occupy, or even enter the office; and if he does so, the proprietor has the right, either in person or through a servant, to require them to leave. *Id.*
3. **PROPRIETOR OF PLACE OF BUSINESS MAY USE SUFFICIENT FORCE TO REMOVE FROM PREMISES** a person who, having no right to remain, refuses to depart after being requested to do so; and he does not incur liability for trespass in so doing; but if in asserting his rights the proprietor uses more force than is necessary to eject the intruder, or inflicts unnecessary injury, he then becomes a trespasser and liable as such. *Id.*

See CONSTITUTIONAL LAW, 13; DAMAGES, 9, 10; EASEMENTS, 3.

TROVER.

IT IS NO DEFENSE TO ACTION OF TROVER FOR PROPERTY SOLD BY DEFENDANT as agent of another, that the property was government bonds payable to bearer, if the principal was not the *bona fide* purchaser. *Kimball v. Billings*, 581.

See BAILMENTS, 2.

TRUSTS.

1. **PURCHASER OF LAND AT COMMISSIONER'S SALE HOLDS TITLE IN TRUST**, where he has agreed with the owner, prior to the sale, that he will buy the land, and that if the owner will within a specified time pay his proportion of the price, he may retain a specified quantity of the land; and the purchaser as such trustee is bound to convey to the original owner upon payment as agreed in pursuance of the agreement. *Miller v. Antle*, 495.
2. **CESTUIS QUE TRUST MAY, DURING CONTINUANCE OF TRUST**, maintain bill against trustee to vacate deeds obtained from them by the trustee. An equity, and a right to apply to have the deeds vacated, arises as soon as the trustee departs from his legal duty. *Smith v. Townsend*, 637.
3. **TRUSTEE MAY BE CALLED INTO COURT OF EQUITY BY CESTUIS QUE TRUST**, at any and all times, for the purpose of having an accounting of the trust property. *Id.*

4. TO SUPPORT PURCHASE BY TRUSTEE FROM CESTUI QUE TRUST of part of trust property, the trustee must divest himself of his character as trustee, and enter into a new and distinct contract with the *cestui que trust*; and it must appear that the latter has the fullest information concerning the transaction and the trust, and that no advantage is taken by the purchaser of information acquired by him in the character of trustee. *Id.*
5. CESTUIS QUE TRUST ARE NOT ESTOPPED FROM IMPREACHING DEEDS GIVEN BY THEM to their trustee, by reason of their having taken legacies under his will, which were not made a charge on the particular property derived under the deeds; nor does any case of election arise under such circumstances. *Id.*
6. CESTUIS QUE TRUST, WHO SECURE VACATION OF DEEDS EXECUTED BY THEM to their trustee, which convey part of the trust property, are in equity bound to repay to the trustee the purchase-money, and sums expended in repairs and permanent improvements, with interest.
7. COURT OF CHANCERY HAS JURISDICTION IN MARYLAND under the act of 1785, chapter 72, and supplement, to decree a sale of trust property for the purpose of a division among the parties entitled to it, upon competent and satisfactory proof that the same is not susceptible of partition without loss, and that a sale will be advantageous to the parties. *Id.*
8. OBJECTION CANNOT BE MADE FOR FIRST TIME IN APPELLATE COURT that there is no proof that the indebtedness named in a deed of trust was unpaid at the time of the sale under the deed, in an action of ejectment in which the plaintiff deduces title through such sale. Such objection should be made in the court below, so as to give to the adverse party an opportunity to obviate it when the deed was introduced in evidence. *Graham v. Anderson*, 89.
9. WHERE TRUST DEED REQUIRES INDEBTEDNESS, PRESUMPTION IS THAT SUCH INDEBTEDNESS REMAINS unpaid, which presumption is only to be rebutted by affirmative proof of its payment. *Id.*

See ADVERSE POSSESSION.

USAGES.

LEASE, AS TO ITS SUBJECT-MATTER, TERMS, AND PROVISIONS, MUST SPEAK FOR ITSELF; and a usage in the neighborhood is not admissible to vary this rule. *Cooke v. England*, 618.

VENDOR AND VENDEE.

VENDOR OF LAND WILL BE ALLOWED ONLY FAIR VALUE OF WHAT IS NOT CONVEYED, where the vendor is unable to give a perfect title, and the vendee elects to take such title as the vendor can give, with compensation for the deficiency. *Woodbury v. Luddy*, 731.

See ADVERSE POSSESSION; FIXTURES, 4. 5.

WAR.

1. WAR WILL OPERATE TO RENDER VOID COMMERCIAL CONTRACTS entered into during its pendency between citizens of one of the belligerents with those of the other belligerent; will suspend the civil remedy upon existing contracts between similar parties, and will dissolve pre-existing

contracts of continuing performance, such as those of partnership and insurance. *Leathers v. Commercial Ins. Co.*, 483.

2. RULES CONCERNING EFFECT OF WAR UPON CONTRACTS BETWEEN BELLIGERENTS will apply as well to a civil war as to an international war, when the former has been authoritatively recognized by the domestic government, for in such case it becomes as to its legal incidents and consequences *quasi* international. But until so recognized, it is a mere insurrection, and will not affect commercial intercourse and transactions. *Id.*
3. POWER TO DECLARE WAR IN UNITED STATES IS LEGISLATIVE, for the constitution delegates to Congress the exclusive "power to declare war." This power includes the power to recognize or declare insurrection as existing war. *Id.*
4. CONTRACTS AND OTHER ACTS OF COMMERCIAL INTERCOURSE BETWEEN BELLIGERENTS were not made illegal by the Civil War in the United States until after the proclamation of the President of August 16, 1861, issued under authority of the act of Congress of July 13, 1861, providing that the President might issue a proclamation interdicting all commercial intercourse between the citizens of the then and thereby recognized belligerent states. *Id.*
5. MORTGAGES EXECUTED DURING CONTINUANCE OF CIVIL WAR by a citizen of one of the Confederate States to a citizen of one of the Union states, was illegal and void. *Hyatt v. James*, 505.

See CONTRACTS, 8-12: MILITARY LAW.

WATERCOURSES.

1. NON-NAVIGABLE STREAM CAPABLE OF BEING USED for floating logs, lumber, and rafts is subject to the public use as a highway, though it is private property; but the public use must be exercised in a reasonable manner, as one person has an equal right with another to its enjoyment. What constitutes a reasonable use depends upon the particular circumstances of each case. *Lancey v. Clifford*, 561.
2. OWNER OF SOIL OVER WHICH FLOATABLE BUT NON-NAVIGABLE stream passes may build a dam across it, and erect a mill thereon, provided he furnishes a convenient and suitable sluice or passage-way for the public by or through his dam; and it is not necessary that the erection of the mill should precede the dam, but if the latter was built at a place suitable for a mill site, and for the purpose of raising water to propel a mill to be subsequently erected, this is sufficient. *Id.*
3. PROPRIETOR HAS RIGHT TO EXCAVATE CANAL for the purposes of navigation entirely within his own boundaries, and to require payment for its use by all who choose to avail themselves of its facilities. *Harvey and Wife v. Potter*, 532.

WILLS.

1. VALIDITY OF WILL MUST BE DETERMINED BY LAWS OF STATE IN WHICH IT WAS MADE. *Burlington University v. Barrett*, 376.
2. WILL MUST HAVE WITNESSES WHERE THEY ARE REQUIRED BY STATUTE. *Id.*
3. RULE OF CONSTRUCTION FOR DETERMINING WHETHER INSTRUMENT IS WILL OR CONTRACT is, that if it passes a present interest, although the right

- to its possession and enjoyment may not accrue till some future time, it is a deed or contract; but if the instrument does not pass an interest or right till the death of the maker, it is a will or testamentary paper. *Id.*
4. INSTRUMENT MAY BE PARTLY DEED AND PARTLY TESTAMENTARY. *Id.*
 5. IN DETERMINING WHETHER INSTRUMENT IS TESTAMENT OR CONTRACT, COURTS DO NOT ALLOW the use of language peculiar to either class of instruments, nor even the belief of the maker as to the character of the instrument to control inflexibly their construction of it; but giving due weight to these circumstances, courts look further, and weighing all the language as well as facts and circumstances surrounding the parties and attending the execution of the instrument, give to it such construction as will effectuate the manifest intention of the maker. *Id.*
 6. LAW OF MARYLAND DOES NOT REQUIRE THAT TESTATOR SHOULD ASK SUBSCRIBING WITNESSES to his will to attest it. His assent either express or implied is sufficient, provided the act be done with his knowledge, and not in a clandestine or fraudulent way. *Higgins v. Carlton*, 666.
 7. MAXIM, NON QUOD DICTUM, SED QUOD FACTUM EST, INSPECTUR, holds good in the execution of wills as well as of deeds. *Id.*
 8. EVERY PERSON IS PRESUMED TO BE OF SOUND MIND AND MEMORY, unless the contrary is proved. The burden of proof is therefore upon the party who asserts unsoundness of mind, unless a previous state of insanity is proved, in which case the burden is shifted to him who claims under the will. *Id.*
 9. AFTER PROBATE OF WILL, SANITY OF TESTATOR IS ALWAYS PRESUMED in favor of the will, and insanity must be proved by him that alleges it. *Id.*
 10. PROBATE OF WILL MEANS PROOF OF ITS FORMAL EXECUTION. *Id.*
 11. WILL IS DULY EXECUTED BY TESTATOR where he affixes his mark thereto by the assistance of one of the subscribing witnesses by the request or with the assent of the testator, and on being asked if he acknowledges the same to be his mark, or words to that effect, assents, and being asked if he wishes the witnesses present to attest it as his last will and testament, assents, and the witnesses attest the same by subscribing their names thereto, by his request, in his presence, and in the presence of each other, provided such testator was at the time of sound and disposing mind, and mentally capable of executing a valid deed or contract. *Id.*
 12. PERSON OF SOUND MIND MAY DISPOSE OF HIS PROPERTY IN ANY MANNER he pleases, consistent with the policy of the law, and it is not a valid objection to a will that the testator gave his property to his wife or to strangers to his blood, provided he was mentally competent and free from undue influence at the time. *Id.*
 13. IT IS NOT SUFFICIENT TO AVOID WILL THAT ITS DISPOSITIONS ARE IMPRUDENT and not to be accounted for. *Id.*
 14. INFLUENCE SUCH AS TO VITIATE WILL MUST BE UNLAWFUL, and must be exerted to such a degree as to amount to force or coercion, destroying free agency. It must be more than the influence of affection or attachment, or the mere desire of gratifying the wishes of another, and there must be satisfactory proof that the will was obtained by this coercion. *Id.*
 15. CAPACITY TO MAKE WILL IS NOT AFFECTED BY AGE, SICKNESS, extreme distress, or debility of body, if sufficient intelligence remain. *Id.*
 16. JURY HAVE NO RIGHT TO REJECT WILL because they think its provisions are unjust and injudicious, although its provisions may be con-

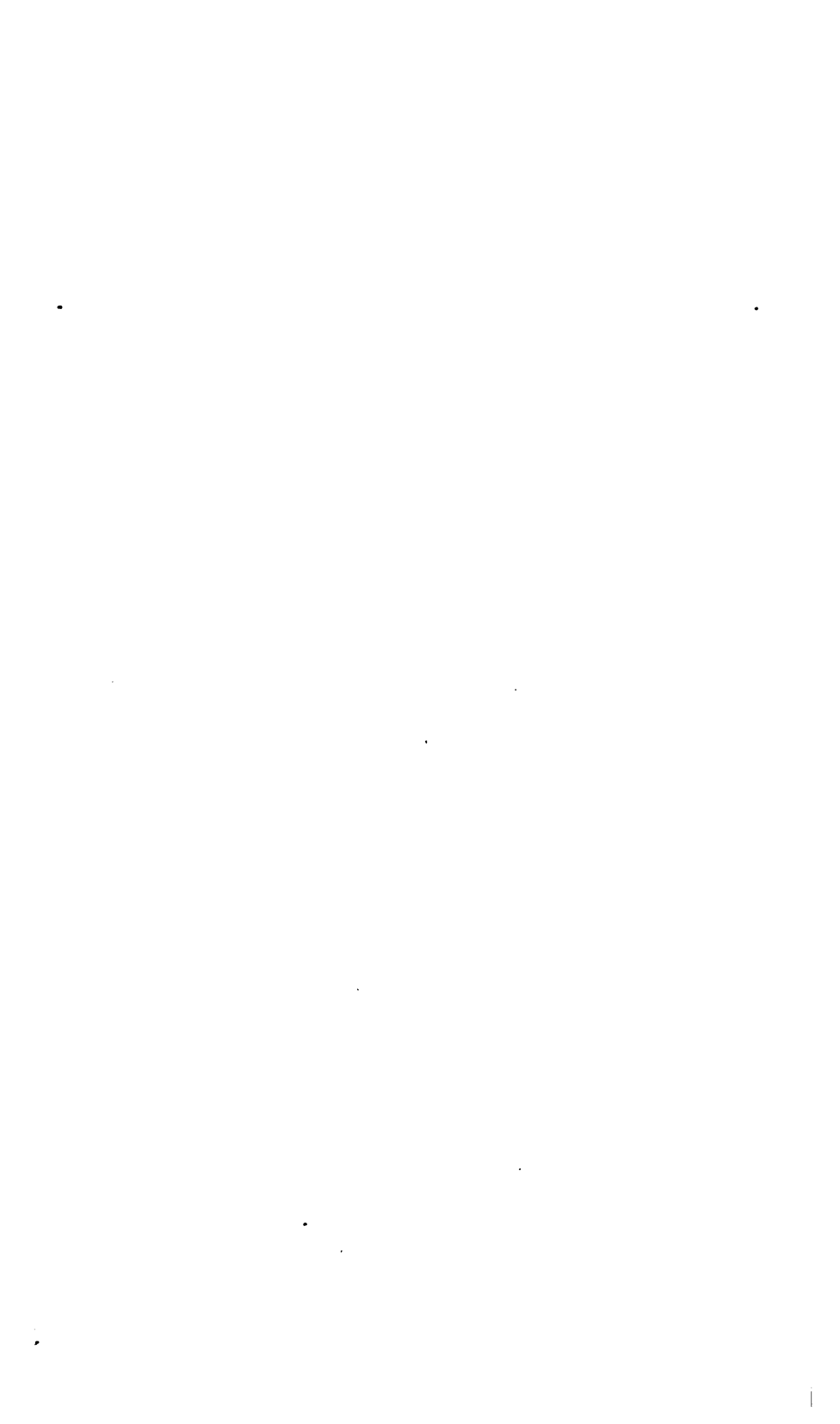
- sidered by them in deciding the question of the testator's capacity or incapacity. *Id.*
17. WILL MAY BE ESTABLISHED AGAINST EVIDENCE OF ONE of three subscribing witnesses thereto. *Id.*
 18. WIDOW CANNOT MAINTAIN SUIT TO SET ASIDE HER HUSBAND'S WILL WHILE RETAINING the personal property taken by her under the will, which was in excess of the amount to which she was entitled under the law. *Ratliff v. Balkheim*, 330.
 19. TERM "CREDIBLE WITNESS," AS APPLIED TO ATTESTING WITNESSES TO WILL, means a witness who was competent at the time of the attestation. *Higgins v. Carlton*, 666.
 20. WILL — SUFFICIENT PUBLICATION AND ACKNOWLEDGMENT TO WITNESSES. — Testator had his will written in the house; went out and called the two subscribing witnesses from a field; said he wanted them to come and sign a paper. They went into the house; the scrivener read over to them the attesting clause, the testator being present in the room, and after the reading the testator handed the pen to the witnesses, who signed the instrument. No words were spoken during this time. *Held*, a sufficient acknowledgment by testator that it was his will. *Allison v. Allison*, 327.
 21. WILLS. — Statute does not require that acknowledgment that instrument is will be made in words or by means of language; any act which indicates the same thing with unmistakable certainty will answer as well. *Id.*
 22. WILLS — PROOF OF SOUND MIND. — Subscribing witnesses must swear that they believe the testator was of sound mind, before his will can be admitted to probate. Where one of them testifies that he does not know whether he was or not, — that he might have been or might not, — this is insufficient. He should be interrogated as to his belief. While he may have no positive knowledge, he undoubtedly has an opinion which the law requires he should state. *Id.*

WITNESSES.

1. CONGRESS OF UNITED STATES CANNOT REPEAL OR MODIFY LAW OF STATE on the subject of negro testimony. *Bowlin v. Commonwealth*, 463.
2. NEGRO IS INCOMPETENT TO TESTIFY AGAINST WHITE MAN under the laws of the state of Kentucky. *Id.*
3. WITNESS CANNOT TESTIFY AS TO MATTER OF LAW, and an interrogatory necessarily involving a question of law is improper. *Tomlin v. Hilyard*, 118.
4. ATTORNEY CANNOT BE COMPELLED TO TESTIFY whether or not a note placed in his hands by a client was indorsed, or had other writing upon its back. *Dietrich v. Mitchell*, 99.
5. WITNESS OF LONG RAILROAD EXPERIENCE CANNOT BE ALLOWED TO GIVE HIS OPINION whether the loud and sudden sounding of a steam-whistle was, under all the circumstances of the particular case, reasonable and prudent, or otherwise; nor is it competent to ask him whether or not similar signals were given by other railroad companies. *Hill v. Portland etc. R. R. Co.*, 601.
6. WITNESS IS NOT INCOMPETENT BECAUSE HE HAS SIMILAR CAUSE OF ACTION against the same parties, if he is not directly interested in the issue under trial, and is not a party to the action in which he is called to testify. *Jennings v. Crider*, 487.

7. TO LAY PROPER FOUNDATION TO DISCREDIT WITNESS by proof of anything he may have said, it is not sufficient to merely direct his attention to dates, names, and other attendant circumstances, but he must also be asked whether or not he has said or declared that which is intended to be proved. *Higgins v. Carlton*, 666.
8. CAVEATORS ARE ENTITLED TO OFFER REBUTTING EVIDENCE ONLY, after the caveatees have closed their case, and it is not error for the court to them refuse to admit testimony which was properly admissible upon the examination in chief of the witness. *Id.*

See EVIDENCE; JURY AND JURORS; WILLS, 12.









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